The Comedy Store *and* American Federation of Comedians *and* American Guild of Variety Artists, Associated Actors and Artists of America, AFL-CIO. Cases 31-CA-9219 and 31-CA-10067

December 16, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND HUNTER

On April 21, 1982, Administrative Law Judge Maurice M. Miller issued the attached Decision in this proceeding. Thereafter, the General Counsel and Respondent filed exceptions and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

Respondent also excepts to the Administrative Law Judge's finding that its owner, Shore, controls the "manner and means" of the performances given by comedians at Respondent's nightclubs in Los Angeles. We find merit in this exception. The record shows that Shore, on occasion, has suggested to some comedians that they modify the content and/or presentation of their acts. The comedians perceive that Shore's "good graces" and positive opinion of their acts will increase their chance of achieving a successful career in comedy and, therefore, they give Shore's advice serious consideration as they develop their acts. Nevertheless, the record reveals that the comedians determine the content, order, and style of their presentations and, in fact, do not always follow Shore's advice. The comedians also may vary their acts according to the length of their allotted performance time, audience reaction, and the content of the preceding comedians' routines. Moreover, the comedians provide their own props, costumes, and music. Based on all of the above, we find that while Shore does have an impact, through her criticism, on the comedians' performances, her influence is not that of an employer specifying the details of its employees' work. Rather, the weight accorded to Shore's suggestions is attributable to her status and position as a "well-connected" impressario in the comedy entertainment field. Thus, we find that the comedians, not Respondent, control the manner and means of their performances. See *Strand Art Theatre, Inc.*, 184 NLRB 667 (1970), and *American Guild of Musical Artists, AFL-CIO, etc. (National Symphony Orchestra Assn.)*, 157 NLRB 735 (1966).

DECISION

STATEMENT OF THE CASE

MAURICE M. MILLER, Administrative Law Judge: Upon a charge filed on July 24, 1979, by American Federation of Comedians (AFC), and duly served, the General Counsel of the National Labor Relations Board (General Counsel) caused a complaint and notice of hearing, dated on December 31, 1979, to be issued and duly served directed to the Comedy Store, designated as Respondent in this Decision. Thereafter, following a charge filed on May 29, 1980, by America Guild of Variety Artists, Associated Actors and Artists of America, AFL-CIO (AGVA), which was likewise duly served, General Counsel caused an amended consolidated complaint, dated on July 16, 1980, and bottomed upon both charges, to be promulgated and served upon the parties concerned. Subsequently, on September 17, 1980, a second amended consolidated complaint was issued and served. Therein, Respondent was charged with the commission of various unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended. Respondent's answers, duly filed with respect to General Counsel's successive complaints, reflected concessions with respect to certain factual allegations therein, but denied the commission of unfair labor practices.

Pursuant to notice, a hearing with respect to these consolidated matters was conducted on various dates between September 30, 1980, and November 7, 1980, in Los Angeles, California, before me. General Counsel and Respondent were represented by counsel.

(On various occasions, while the hearing was in progress, John A. Lawrence, AFC's counsel, and Jon Russo, AGVA's business representative, noted special appearances on behalf of their respective clients or principals, primarily in connection with record discussions related to *subpoena duces tecum* compliance matters.)

Each party was afforded a full opportunity thereafter to be heard, to examine and cross-examine witnesses, and to introduce evidence with respect to pertinent matters. During the hearing, General Counsel's motion to amend his second amended consolidated complaint, with respect to certain particular matters set forth therein, was granted; Respondent's denials on the record with respect thereto were noted.

Since the hearing's close, comprehensive, well-researched, and helpful briefs have been filed on behalf of General Counsel and Respondent; these briefs have been duly considered.

FINDINGS OF FACT

Upon the entire testimonial record, documentary evidence received, and my observation of the witnesses, I make the following factual determinations.

I. JURISDICTION

Respondent functions as a California corporation, with a headquarters office located within its principal Los Angeles, California, place of business, where comedy entertainment programs are provided for public patronage.

The record herein reflects Respondent's concession that it maintains a business enterprise. In the course of Respondent's business operations, it derives gross revenues in excess of $500,000 yearly. The record further reflects Respondent's stipulation that, during its corporate fiscal year which ended May 31, 1980, specifically, the firm purchased goods and services in the amount of $5,000, approximately, directly from out-of-state suppliers.

Despite its concession, for the record, that it maintains a business enterprise, Respondent contends that it should not be considered subject to this Board's statutory or discretionary jurisdiction; the firm's contention purportedly rests upon two grounds:

First, Respondent maintains that—while it currently maintains and operates two Los Angeles facilities within which public entertainments are provided, plus a La Jolla, San Diego County, California, facility—those facilities may not properly be characterized as nightclubs.

Second, Respondent concedes that—in the course of its business operations—it purchases and receives goods or services valued in excess of $50,000 annually from sellers or suppliers located within the State of California, but contends that it lacks knowledge sufficient to form a belief with respect to whether such seller and suppliers receive the goods which Respondent purchases, in substantially the same form, directly from out-of-state sources; Respondent, therefore, denies that its purchases from California suppliers constitute "indirect inflow" derived from, or related to, interstate commerce.

Upon these grounds, Respondent denies that it should be considered an employer "engaged in commerce and in a business affecting commerce" within the meaning of the statute herein. No defined rationale, putatively supportive of Respondent's denial, has however been proffered for the present record.

Respondent's presentation, generally, suggests a contention, nevertheless, that its publicly patronized Los Angeles facilities, particularly, are maintained and function—primarily—consistently with a service-centered "workshop" format, somewhat akin to that found in college-type teaching facilities, whereby so-called "stand up" comedians and comediennes, whether newcomers or performers with established reputations, are provided with regular or recurrent opportunities to "work out" while practicing their several comedic skills before presumptively receptive "live" audiences; to run through or "break in" their acts, while testing public reactions, with respect to some hopefully programmed new material or planned changes in their comedy "routine" presentations; and to refine, "hone down," or perfect their particular performance techniques.

(The record shows that—conjoined with Respondent's nightly comedy act programs presented as *public* entertainments—the corporation's president, owner, and self-designated "total" operator, Mitzi Shore, frequently sets up and presents so-called showcase programs during which comedians and comediennes, designated by Shore or selected pursuant to their personal requests, perform before public audiences which, however, may likewise include specifically invited theatrical, television, and film producers, talent scouts and nightclub proprietors, together with other prospective "purchasers of talent" for engagements within the general field of comedy entertainment or dramatic production. Frequently, also, several participants in Respondent's public programs, or tangentially connected with their presentation, provide conventional, *privately conducted* workshop seminars, wherein—normally for a small fee—comedians, comediennes, and members of the public interested in learning how to perform comedy may "get together" to exchange views and suggestions with repect to matters of professional comedic concern, to receive coaching from recognized mentors with respect to their performance techniques, or to practice their comedic skills, for "feedback" coupled with some critical evaluation by their "workshop" preceptors or participatory peers.)

Presumably, Respondent seeks a determination, bottomed upon these considerations that—while its several California facilities may, concededly, function with a substantial support staff or paid "employees" encompassing office personnel, waitresses, bartenders, barboys, and managers—the firm should not be considered a conventional employer, within the meaning of the statute, whose *primary* operations relate significantly to trade, traffic, and commerce among the several States.

No such determination, within my view, would be warranted.

In this connection, Respondent contends, vigorously, that its Los Angeles establishments particularly should not be considered "nightclub" facilities. The firm's specific reason—for its contention that Comedy Store presentations should somehow be distinguished from nightclub shows, particularly, for jurisdictional purposes—has, however, nowhere been clearly articulated; Respondent's counsel, when queried, contended merely that "some cases which refer to night clubs" and "certain other case law" holding nightclub performers to be statutory employees should not be considered persuasively relevant, with respect to his client's situation. (Respondent suggests that Comedy Store functions, within its Los Angeles locations particularly, should be considered distinguishable from "traditional" nightclub operations, for several reasons: First, because nightclubs generally present three relatively lengthy, varied "acts" per show, plus music provided by a band, while Comedy Store programs normally compass numerous, relatively short, presentations provided, more or less continuously, by successively scheduled stand-up comics; second, because nightclubs generally publicize and present polished "acts" provided by established, well-regarded, performers during limited engagements, subject to defined restrictions with regard to their scheduled times of performance and the nature of their stand-up material, while Comedy Store presentations may compass both well-known comic practitioners and people without widely recognized reputations, who perform and practice their skills within the designated "workshop" setting previously noted herein.)

Upon this record, however, I would conclude, for whatever significance such a determination may have, that, so far as the public is concerned, Respondent's operations substantially parallel, and may properly be equated with, those maintained by conventional night-

clubs. Like them, Respondent's Los Angeles facilities solicit public patronage; they generally levy a door "cover" charge; within their public rooms, they provide patrons with liquid refreshment pursuant to stated minimum charge policies; they present a program of "live" public entertainment, daily, during stated nighttime hours, for persons seeking such diversion or recreation. Some Comedy Store performers, so the record herein shows, have publicly referred to Respondent's Los Angeles facilities as "the club" while comparing it with "other" clubs. And Shore, within a lengthy personal statement painted, presumably pursuant to her direction, on the wall at Respondent's Sunset Boulevard location, has—herself—publicly described the facility as "a workshop type of nightclub" for stand-up comedians. Within my view, Respondent's suggestion that the facilities noted should not be considered nightclubs merits rejection.

In any event, Respondent concedes—as previously noted herein—that, whatever her Los Angeles establishments may be called, Shore currently maintains a business enterprise. In connection therewith, I find, she provides services, primarily retail in character, from which she derives income. Besides her Los Angeles facilities, wherein public entertainments are presented before paying customers, these services presently compass:

First, Respondent's La Jolla, California, facility previously noted which, concededly, functions consistently with a conventional "night club" format. Comedy shows are presented twice nightly, at set times, with a master of ceremonies, plus three "name" performers, generally booked for weekly engagements, with their total compensation set pursuant to negotiated contracts.

Second, Shore's booking and/or referral service, which—when requested—dispatches comedians to perform for private parties; Respondent's proprietor sets and collects fees charged for their services, from which she retains a prearranged percentage.

Third, Respondent's comparable talent referrals, whereby comedians or comediennes are dispatched to particular booking agents, who thereupon arrange compensated "college [campus] tours" for them; Shore derives her percentage compensation cut, in such cases, from the net pay which these touring comedy performers permissibly retain, after their travel and living expenses on the record have been deducted.

Respondent's proprietor further provides frequent and recurrent talent scout services for the American Broadcasting Company; the record is silent, however, with regard to whatever compensation she may have heretofore received, or may currently be receiving, in that connection.

Upon this record, I find, Respondent's Los Angeles business operations—which constitute our primary focus of concern herein—cannot reasonably be considered essentially local in character. This Board's most recent decisions—with regard to business enterprises within the amusement and entertainment field—clearly foreclose any such determination. (Compare *Keamco, Inc.*, 90 NLRB 652, 653, 656–657 (1950); therein, this Board, within a decision reached 3 months before the development and promulgation of its first set of discretionary jurisdictional standards, held that a single motion picture theater, which could not be considered an integral part of some multistate enterprise, provided a service which "affected" commerce within the meaning of the Act; the Board concluded, however, that, since the theater's operations were "essentially local" in character, the assertion of its jurisdiction would not effectuate statutory policies. Some 11 years later, this Board found, nevertheless, that the operations of a local sightseeing tour enterprise, functioning primarily within the "amusement or entertainment" field, had a close, intimate, and substantial relationship to trade, traffic, and commerce; that it made substantial out-of-state purchases; that its services were provided for ultimate consumers, and were thus primarily retail in character; and that its gross annual revenues for a recently concluded fiscal year satisfied the Agency's currently relevant retail jurisdictional standard. (*Carolina Supplies and Cement Co.*, 122 NLRB 88, 89 (1960).) The Board therefore refused to decline jurisdiction over the sightseeing tour business. *Ray, Davidson & Ray*, 131 NLRB 433, 434–435 (1961); compare *Actors' Equity Association*, 247 NLRB 1193, 1194, fn. 2 (1980); *American Guild of Variety Artists (Golden Triangle Restaurant)*, 155 NLRB 1020, 1023–25 (1965), and cases therein cited; *The League of New York Theatres, Inc.*, 129 NLRB 1429, 1431–33 (1961); *Combined Century Theatres, Inc., et al.*, 120 NLRB 1379, 1383–84 (1958); 123 NLRB 1759, in this connection.)

Since Respondent currently derives gross revenues, which exceed $500,000 yearly, from its business operations, and concededly purchases certain supplies from out-of-state sources, which cannot, reasonably, be considered *de minimis* merely, I find that its operations do "affect" commerce, and that assertion of the Board's jurisdiction herein should be considered warranted and necessary to effectuate statutory objectives.

II. CONCERNED LABOR ORGANIZATIONS

A. *American Federation of Comedians*

Within successive consolidated complaints herein, General Counsel had designed this proceeding's first Charging Party, American Federation of Comedians (herein AFC), as a labor organization, within the meaning of Section 2(5) of the statute. Respondent has, however, formally challenged the correctness of General Counsel's designation.

The statute, of course, provides that "labor organizations" compass "any organization of any kind" wherein "employees" participate, which exists for the purpose, in whole or in part, of dealing with "employers" concerning "grievances, labor disputes . . . rates of pay . . . or conditions of work" particularly.

There can be no doubt that American Federation of Comedians, when filing its charge herein, and thereafter, constituted, and still constitutes, a viable "organization" cognizable as such for present purposes. Within his brief, Respondent's counsel currently presses no contrary contention.

AFC's genesis, so the record shows, derives from a concededly less-than-formal March 19, 1979, gathering,

within Respondent's Sunset Boulevard facility, when slightly more than 100 comedians and comediennes—who had theretofore performed as "regulars" within Respondent's Los Angeles facilities—met to consider certain grievances and problems which Respondent should, within their view, be requested to resolve. (Male performers who provide stand-up comedy entertainment are commonly designated as comedians; female performers, similarly engaged, are called commediennes. Consistently with the stylistic convention cogently proposed by Respondent's counsel, within his brief, such performers will be designated, generically, as comedians hereinafter; they will be, likewise, referenced in masculine singular terms, purely for reasons of stylistic simplicity and convenience, save in cases where a gender-related designation would normally be considered necessary.)

The significance of the gathering putative limitation to stand-up comedians who had previously been considered "regular" performers at Respondent's Sunset Boulevard and Westwood facilities will be reviewed subsequently within this decision.

Those present and participating, during this informal March 19 gathering, determined, consensually, that a pay policy demand, previously presented to Respondent's proprietor, should be reaffirmed, and that some collectively bargained "agreement" with Respondent should be negotiated. In furtherance of their purpose, pursuant to general agreement, they designated a spokesman qualified to function as their negotiator; likewise, they voted, tentatively, to withhold their services from Respondent concertedly, in support of their compensation demand; their determinatin was affirmed through a secret ballot. Further, they determined initially that their *ad hoc* group should be designated as Comedians for Compensation (herein CFC), for public references purposes. (Subsequently, following developments which will be noted hereinafter, the group's members consensually concurred with a suggestion that, collectively, they should be designed Comedians for Comedians, since their declared objective with respect to winning compensation for their performances had—by then—presumptively been realized.)

When the group met thereafer, on March 25, they reaffirmed, by voice vote, the previous secret-ballot decision, herein noted, to withhold their services. On March 27, their work stoppage, publicized with picket lines at both of Respondent's Los Angeles facilities, began.

While CFC concededly lacked a formal organizational structure when the work stoppage hereinabove noted commenced, the record warrants a determination—which I make—that, within the 3-month period between March 27 and July 3, 1979, participants in the group's concerted action, and their supporters, took steps to define, somewhat more precisely, CFC's structure and functions.

Initially, during April, while the work stoppage previously noted was still being maintained, a nominal membership meeting was convened. Those present voted, among other things, to formalize CFC's organization; they created a so-called Interim Board, with power to direct organizational activities and prepare a definitive charter draft. (While the group, then, had no dues-paying members, and provided no specific documentation calculated to signify their formal affiliation, such as membership cards, those "regular" performers at Respondent's Los Angeles facilities who had, theretofore, given their names and telephone number to CFC's designated leaders, and who had supported the work stoppage, for the purpose of procuring some remuneration for Respondent's regular comedians, were considered members.)

Twelve volunteers were designated as the group's Interim Board members. When subsequent negotiations between CFC's spokesmen and Respondent's proprietor produced a May 3 collectively bargained "agreement" pursuant to which the work stoppage previously noted was terminated, the comedian group's Interim Board provisionally confirmed the various settlements reached, pending their May 4 and 6 ratification by the collective body's general membership.

The document which Respondent's proprietor and CFC's spokesman had negotiated, designated as their "agreement of settlement" specifically, provided, *inter alia*, that Respondent would, "subject to the provisions of applicable law," recognize CFC as the exclusive bargaining representative of comedians who had previously performed at Respondent's facilities as part of Respondent's regular 6-day weekly schedules, or who would, thereafter, perform "compensable sets" pursuant to such schedules. Further, the document defined Respondent's weekly "set" performance schedules; provided a minimum compensation rate for performers; committed both "parties" mutually to forswear "discriminatory or retaliatory" action directed against their respective members, employees, officers, principals or agents, bottomed upon their conduct during the work stoppage previously noted, or during settlement negotiations; and established grievance procedures, which CFC, or that group's members, might invoke with respect to "[events] giving rise to . . . [disputes]" not specifically defined, and which could culminate in binding arbitration, upon the grieving party's demand. The settlement agreement, finally, provided for a 2-year "effective term" commencing upon the document's written acceptance by designated representatives of the parties.

On various dates, subsequent to May 7, when a fully executed copy of their settlement agreement was delivered to Respondent's proprietor by CFC's spokesman and principal negotiator, the group's grievance committee submitted written grievances to Respondent for discussion and resolution.

During a June 1979 general "membership" meeting, CFC's putative "members" voted to ratify a decision by their Interim Board, whereby the designated group's name would be changed to American Federation of Comedians, called AFC hereinafter. Proposed articles of association and bylaws for the renamed group were then being drafted.

On July 3, during a meeting, scheduled and convened pursuant to AFC's call, the group's presumed membership voted, unanimously, to ratify their proposed articles of association and bylaws. Those present signed AFC's charter scroll, and were recorded as charter members. Subsequently, during a late August–early September

period, AFC's recognized membership nominated and selected a slate of current officers. These officers continued to police the settlement agreement which CFC's spokesman had negotiated with Respondent's proprietor; several new grievances were filed thereunder (in the meantime, AFC's several charter documents had been filed with the U.S. Department of Labor, pursuant to the Labor Management Reporting Act's presumed requirements.)

AFC's dues had, initially, been set at $25 per year. The group's first annual dues bills, however, were not prepared until February 1980; thereafter, sometime in March 1980, they were dispatched to enrolled members.

With matters in this posture, there can be no doubt that AFC, certainly since its formal adoption of that demonstrative designation, has functioned as a viable organization for the purpose of dealing with Respondent, particularly, concerning compensation rates, conditions of work, and grievances filed on behalf of various stand-up comedians, whom it purportedly represented. (Though AFC, when it came into being and first undertook concerted action for the purpose of "dealing with" Respondent relative to compensation grievances—while functioning with the tentative CFC designation herein noted—had no formal structure, lacked a formally elected leadership, lacked a constitution and bylaws, and collected no dues, the group's concededly *ad hoc* character dictates no determination herein that it was not a viable "organization" within the meaning of the statute, when its May 3 settlement agreement with Respondent was negotiated and signed. See *Columbia Transit Corporation*, 237 NLRB 1196 (1978); *S & W Motor Lines, Inc.*, 236 NLRB 938, 942 (1978), and cases therein cited.)

Respondent's counsel, within his brief, currently proffers no contary contention. Counsel seeks a determination, rather, that comedians who were considered regular performers at Shore's Sunset Boulevard and Westwood, Los Angeles, locations provided their services as recognized "independent contractors" rather than as statutorily cognizable employees; consistently with this view, Respondent contends that AFC should not be considered a statutorily defined labor organization, since it did not, and does not, represent "employee" participants, while dealing with a conceded employer, within the meaning of the statute.

This contention, coupled with Respondent's further contention that AFC lacks "standing" qualifying it to press charges herein, will be considered and resolved, subsequently within the present Decision.

B. *American Guild of Variety Artists*

Shortly following AFC's July 3 formation, Respondent dispatched a letter—dated July 17, 1979, and signed by Shore's executive assistant—directed to Comedians for Compensation; therein, the group's leadership and comedian members were notified that, for various reasons, Respondent considered their "May 2nd letter" breached by certain aspects of CFC's subsequent conduct, unilaterally rescinded, and consequently void.

Confronted, thus, with Respondent's withdrawal of recognition, AFC commenced negotiations looking toward the consummation of some formalized relationship with the American Guild of Variety Artists (herein AGVA), whereby the latter organization would take over AFC's collective-bargaining responsibilities. Consensual understanding were—so the record shows—reached, pursuant to which, following a ratification vote by AFC's membership, AGVA would undertake to represent AFC, specifically, together with that organization's various comedian members, for collective-bargaining purposes, including, *inter alia* the prospective maintenance, administration, and enforcement of the May 3 settlement agreement previously negotiated between CFC's spokesman and Respondent's proprietor. Further understandings were reached that—with respect to various other clubs where AFC members might perform—AGVA would notify AFC regarding any commencement of negotiations for collective-bargaining agreements, and that AFC would retain a right to ratify whatever agreements AGVA might reach with other clubs where AFC members performed.

On February 3, 1980, AFC's membership—summoned to a properly noticed special meeting—voted, unanimously but for a single abstention, to assign AFC's collective-bargaining powers and responsibilities to AGVA, particularly for the purpose of dealing with Respondent herein. (AFC's president, before the secret-ballot vote was conducted, had announced that individual AFC members would be considered eligible to join the AGVA, with a reduced initiation fee—should AFC's affiliation with AGVA be approved—but that such action would not be considered a prerequisite to AGVA's formal assumption of AFC's collective-bargaining duties and powers.)

The record herein reveals that—since the February 3, 1980, vote—AFC has nevertheless continued as a viable organization, with dues-paying members. The group's elected officers, together with its board, have continued to function; membership meetings are held periodically.

With matters in this posture, General Counsel's representatives within their brief suggest that AGVA may properly be considered AFC's designated agent for collective-bargaining purposes, since the February 3, 1980, vote. Alternatively, General Counsel suggests that—since the date designated—AGVA has functioned as AFC's validly selected "successor" with respect to representation of that designated organization's members, particularly for the purpose of collective bargaining with Respondent herein.

Whatever determinations the record may warrant, with respect to these suggestions, there can be no doubt that, herein, AGVA may properly be considered a labor organization which, *inter alia*, represents "employees" within the entertainment industry for collective-bargaining purposes. On several occasions, this Board has so held, in various situational contexts. *American Guild of Variety Artists, AFL-CIO (VARU)*, 166 NLRB 521, 522, fn. 1 (1967); *American Guild of Variety Artists, AFL-CIO (Fontainebleau Hotel)*, 163 NLRB 457, 459 (1967); *American Guild of Variety Artists, AFL-CIO (VARU)*, 162 NLRB 1416, 1417 (1967); *American Guild of Variety Artists, AFL-CIO (Golden Triangle Restaurant, Inc., et al.)*, 155 NLRB 1020, 1021-25. See 420 F.2d 311 (5th Cir.

1969), enfg. 163 NLRB 457 (1967); compare *Wirtz* v. *American Guild of Variety Artists, AFL-CIO*, 267 F.Supp. 527 (D.C.S.D.N.Y. 1967), 64 LRRM 2406, 2407, in this connection. For present purposes, these Board determinations must be considered dispositive.

Whether this organization—when functioning, specifically, as AFC's designed "agent" or presumptively qualified "successor" with particular reference to maintaining or enforcing AFC's May 3 settlement with Respondent previously noted herein—represents statutory employees for collective-bargaining purposes, or lacks cognizable "standing" sufficient to validate its charges herein, will be considered subsequently within this Decision.

III. UNFAIR LABOR PRACTICES CHARGED

A. *Applicability of the Statute*

Within its formal declaration of policy, the National Labor Relations Act refers to denials by some *employers* of the right of *employees* to organize, and the cognizable inequality of bargaining power between employees who do not possess full freedom of association and *employers* organized in corporate form. The statute further declares its purpose and policy to protect the right of *employees* to exercise "full freedom of association, self-organization, and designation of representatives" for the purpose of negotiating with *employers* regarding their employment terms and conditions. Within the amendatory Labor Management Relations Act's declaration of policy, Congress likewise declared its purpose and policy "to prescribe the legitimate rights of both *employees* and *employers*" with regard to their relations affecting commerce.

Consistently with these declarations, the statute, as amended, provides—within Section 7 specifically—that "employees shall have the right to self-organization . . . to bargain collectively through representatives of their own choosing, and to engage in other concerted activities" for collective-bargaining purposes, or for other mutual aid or protection. As referred to, throughout the statute, the term "employee" has been defined to compass any employee, without being limited to the employees of a particular employer, unless the statute states otherwise, specifically. Congress has, however, declared that "any individual having the status of an independent contractor" shall not be considered a covered employee, qualifying for statutory protection.

Necessarily, therefore, Respondent's contention that stand-up comedians, generally, should be deemed "independent contractors" rather than statutorily defined employees—for present purposes—presents a threshold question, which must be resolved before General Counsel's contention, regarding purportedly proscribed conduct presumptively chargeable to Respondent's proprietor, can properly be considered

1. Background

a. *Respondent's operations described*

In 1972, Sammy Shore and his wife, Mitzi Shore, started the Comedy Store; they commenced their public presentation of comedy performances within the cocktail lounge of Ciro's Hollywood, California, nightclub, which now houses Respondent's Sunset Boulevard facility. Shortly thereafter, during 1973, Mitzi Shore became the Comedy Store's sole operator; and, during the following year, she opened a second Los Angeles facility, located in that city's Westwood Village neighborhood. In August 1977, Shore purchased the complete Sunset Boulevard structure.

Less than a year later, Respondent's proprietor opened a third facility, located in La Jolla, San Diego County, California, which she concededly considers a conventional "professional" nightclub. For a time, Respondent likewise presented comedy shows within a Mission Valley, San Diego, location; that facility, however, closed while the present hearing, with regard to matters which are currently in controversy, was in progress.

Within its two Los Angeles facilities, Respondent presents continuous shows featuring stand-up comedians, between 8:30 p.m. and 1:30 a.m., or 2 a.m. nightly, throughout the calendar week; two shows, featuring six comedians each, are presented on Friday and Saturday nights. (The so-called stand-up comedians featured may present comic monologues individually, or performed in teams. Their performances—for current purposes—must be distinguished, however, from those provided by groups of comedians who work from scripts, or so-called "improvisational" actors who present spontaneously devised comedy skits, based upon volunteered audience suggestions, regarding various proposed topics with which their presentations might deal. Respondent occasionally presents performances by such ,mprovisational groups. The participants therein may—sometimes—compass performers who, likewise, perform stand-up comedy routines at various other times, whether for Respondent or different club operators.)

At Sunset Boulevard, Respondent presents shows in three rooms—the "Original Room" (so named because it was the first room), the "Main Room" (formerly Ciro's nightclub), and the "Belly Room" located on the facility's second floor. In Westwood, Respondent maintains a single showroom.

The Original Room seats some 200 customers; Respondent levies a cover charge and requires a two-drink minimum purchase. Between 12 and 15 comedians provide a continuous comedy show, on week nights, with each comedian's performance running between 15 and 20 minutes. On Friday and Saturday nights, 12 acts are presented, divided into 2 separate shows, with each comedian performing for 25 minutes. A piano player provides background music, plus introductory entertainment.

Sunset Boulevard's Main Room seats between 450 and 600 patrons, when filled to capacity. For some time, prior to the period with which this case is concerned, no public comedy performances were presented there—save on those special occasions when the room may have been rented by some well-known "star" comedian, for the purpose of producing and presenting a particularly publicized show wherein he, or she, would be featured. In February 1979, however, Shore began presenting Main Room performances, limited to Friday and Saturday nights, which featured "headliner" comedians with well-established public reputations. These shows—which

normally had 8:30 p.m. starting times—would compass performances by some 10 comedians, with each presenting a monologue "spot" or "set" lasting 20–30 minutes. Patrons were subject to cover charges, plus a two-drink minimum purchase charge. Again, Respondent's piano player provided background music.

The so-called Belly Room seated some 75 patrons. Pursuant to Respondent's policy, subsequent to the fall of 1978, this room normally featured 6–8 women comedians, who performed successive 20-minute "spots" between 8 p.m. and 12:30 a.m., commencing whenever a sufficiently sizeable audience had been assembled. Drinks were served, subject to a minimum purchase requirement. At some time, shortly following Respondent's dedication of the Belly Room to performances by comediennes, cover charges were levied for Friday and Saturday night presentations.

At Westwood, Respondent's facility seats between 130 and 175 patrons. From Sunday through Thursday, weekly, some 12–15 comedians provide successive 15–20 minute "spot" monologues; on Fridays and Saturdays, 2 shows are presented, with 6 comedians each. Respondent's piano player provides incidental music. Cover charges are levied, plus a two-drink minimum purchase requirement.

The testimonial record warrants a factual determination—which Respondent has not effectively challenged—that Comedy Store liquor sales, during the first 9-month period within the business enterprise's 1978–79 fiscal year, provided some 50 percent of its gross sales. And, during that 9-month period, so the record shows, Respondent derived a $200,000 net profit. For present purposes, the gross revenues which Respondent's various operations, described herein, produced within the designated 9-month period need not be determined. There can be no doubt, however, that they substantially exceeded the "net profit" figure hereinabove noted; I so find.

b. *How comedy performers are engaged*

As previously noted, Respondent features continuous shows of stand-up comedians, within both of its Los Angeles locations. The comedians presented come from a candidate group, designated as so-called "regular" performers, previously granted verbal recognition as such by Respondent's proprietor.

Comedians normally win Shore's recognition as qualified performers, eligible for Tuesday through Sunday presentation at Respondent's facilities, by auditioning their "acts" for her consideration. Monday nights at Respondent's Sunset Boulevard facility are regular audition nights. Amateurs desirous of careers as comedy performers, and comedians with previous experience desirous of careers as comedy performers, and comedians with previous experience who may not have performed within the Los Angeles area, or come to Shore's notice otherwise, may take Respondent's Original Room stage and present their stand-up routines for her critical appraisal. (Those who perform are conventionally designated as "Monday nighters" or "pot-luckers" since, presumably, most of them have not—yet—won general recognition as qualified practitioners of their professed art, within the local comedy community.)

Respondent's proprietor judges their qualifications, so the record shows, by both objective and subjective standards. Their presentations must produce results; they must, in a word, generate audience laughter. Further, however, their routines must—so testimony, which I credit, suggests—reflect both performance styles and content which, however varied they may be, satisfy Shore's personal standards with regard to comedy entertainments worthy of Comedy Store presentation.

On the basis of Shore's critical evaluations, Monday night performers are specifically recognized or rejected verbally, as candidates for future Tuesday-Sunday scheduled performances at Respondent's Los Angeles locations. Those whom Shore accepts become "regulars" within the Comedy Store's particular parlance.

c. *Scheduled performances*

Comedians considered "regulars" because they have, sometime previously, auditioned successfully may telephone Respondent, weekly, on Mondays specifically; they may, then, request projected "spots" within Respondent's prospective schedule lineup, which will list those comedy performers who have been selected for presentation throughout the balance of that particular calendar week. Normally such callers—limited to those previously or recently designated as qualified regulars by Respondent's proprietor—tell Shore's secretary the Tuesday-Sunday dates, preferred times, and preferred locations at which they would like performance time allotted during the week. (On occasion, should Respondent be organizing some special event, Shore or her subordinates may, however, telephone a comedian, to ask whether he would wish to participate.)

Taking into consideration each comedian's requests, Respondent's proprietor then makes up her schedule for the week, designating the time, projected length, and locations for each comedian's performance or performances.

(General Counsel's witness, Tom Dreesen, testified—credibly within my view—that Shore once described her functions, when preparing her weekly performance schedule, as comparable with those performed by television show producers.)

Comedians will not be scheduled for performances on days which they have not requested; determinations with regard to their scheduled times of performance, their performance's length, and their performance's particular location, are reserved, however, for Shore's discretion.

Thereafter, on Tuesday, after the week's schedule has been determined, comedians may call Respondent's Sunset Boulevard office, during daytime hours, to learn which of their spot requests have been granted. The record warrants a determination—which I make—that scheduled comedians can then report their acceptance or rejection of some particular spot or spots for which they may have been listed; some credible testimony, however, suggests that, in practice, such prompt rejections have been rare.

(With respect to whether comedians who promptly reject Respondent's proffered spots suffer disciplinary reprisals, the record will not—within my view—warrant a

definitive determination. Comedian Dailey Pike, testifiying in Respondent's behalf, reported that he had never suffered "repercussions" following a particular spot's rejection or cancellation. General Counsel's witness, Susan Sweetzer, claimed, however, that she had, once, turned down a mistakenly proffered Wednesday night spot which she had not requested because of some conflicting commitment, and that she had not been granted performance spots for 2 weeks thereafter. Considered in totality, nevertheless, the record will not, preponderantly, support a determination, within my view, that Sweetzer was, consciously and deliberately, denied performance time by way of discipline or punishment for her prior refusal to perform.)

Comedians who call, whether or not they receive spot assignments, may concurrently request placement on Respondent's so-called fall out list; this phrase designates a list, prepared weekly, showing Comedy Store regulars who have volunteered to fill in, with relatively short notice, should be scheduled comedian's subsequent cancellation, with respect to his Tuesday notice of performance time, be reported.

As noted, comedians—once they have been scheduled to perform—may reject a proffered spot or request cancellation. When this happens, the comedian concerned is reported to have "fallen out" with respect to the week's schedule. Another comedian, normally, will thereupon be chosen, from the week's volunteer "fall out" list, qualified to replace him. Alternatively, however, Respondent's representatives may telephone some other comedian, for the purpose of offering him the canceled performer's spot.

The record, within my view, warrants a determination—consistent with Respondent's factual contention, proffered within its brief—that the size and particular composition of the group considered "regulars" whose members may be seeking performance spots, during successive Monday call-in periods, routinely fluctuates. Comedians may travel, soliciting or fulfilling professional engagements in various other communities. Those who might be, for a time, committed to such "road" tours, together with those who might be currently involved with conflicting film or television show productions, locally, may be precluded or prevented, thereby, from soliciting Comedy Store performance spots for significant periods, varying in duration. They are still, however, considered "regulars" qualified to solicit subsequent performance time allotments at Respondent's several facilities, when they return or again become "available" thereafter. In short, recognized "regular" status, when conferred—however informally—by Respondent's proprietor, has normally been considered a continuing status, despite a comedian's subsequent failure or lack of availability to solicit spots within a Comedy Store facility for prolonged periods, so long as that comedian remains a currently "active" performer with publicly recognized comedic skills.

Once granted performance time, comedians are expected to perform as scheduled. Should their conformity with Respondent's previous promulgated schedule belatedly become difficult or impossible for some reason, however, the comedians concerned have certain options. Should some verbal notice to Respondent's designated personnel—sufficiently beforehand—prove possible, they may request a schedule change. (Shore generally handles such change requests, personally, since—when her weekly lineup schedules are prepared—she considers a prearranged "order" with respect to performances quite important. She endeavors, so the record shows, to feature successive performers with varied styles, during each facility's evening presentation.)

Alternatively, comedians who find themselves—on short notice—unable to perform, during their scheduled spot time, may cancel. Should this become necessary, however, the comedian concerned is expected to notify Respondent's designated office personnel, or the scheduled show's master of ceremonies, sufficiently in advance so that some sort of substitution can be managed. (The record, with respect to Respondent's notice requirement, provides no substantial, reliable, or probative evidence regarding the minimal period of prior notice, regarding unavailability which Respondent desires, expects, or requires. Presumably, Respondent's management representatives and Shore determine, case by case, whether timely notification has been proffered, with due regard for each case's particular circumstances. The record does reveal that—for a brief period following the March-May 1979 work stoppage previously noted—Respondent had a posted policy requiring 8 hours' advance notice with respect to cancellations; that policy was abandoned within a period of weeks, however, when it proved unworkable.)

Comedians who report late may, sometimes, be permitted to perform, nevertheless, following their tardy arrival; this would be true, particularly, with well-known "headline" performers. With respect to comedians of lesser stature, late arrivals whose tardiness may have caused a scheduled "hole" may find their previously designated spot taken by some replacement. They will, in short, find themselves "bumped" or denied performance time that night.

The record, considered in totality, warrants a determination—which I make—that comedians who report late, or who fail to report, without prior notice, for their previously scheduled spot assignment, may be reprimanded thereafter by Respondent's proprietor. (Some of General Counsel's witnesses testified regarding their "thought" or "belief" concededly based upon nothing more than limited personal observations, plus hearsay reports from fellow comedians, that tardy performers or particular "no shows" might—under certain circumstances—be disciplined further. These witnesses claimed that, upon occasion, Shore could—and did—schedule such tardy or "no show" performers for subsequent spots on weekday nights generally considered less desirable, or for less prestigious spot performance times, which preceded or followed some particular night's "prime time" period.)

Conceivably, Shore *could* discipline tardy performers, or particular no-show comedians, by completely denying them performance spots for some limited period, or by granting them—for a limited time—fewer or less desirable spots. Certainly, General Counsel's several testimonial proffers persuasively suggest that, throughout the

period with which this case is concerned, various comedians, *subjectively*, considered such possible disciplinary reprisals, by Respondent's proprietor, clearly within her recognized powers. However, Respondent's various post-strike performance records—which have not been challenged or contradicted herein—warrant a determination, contrariwise, that Shore does not, *routinely or pursuant to fixed policies*, currently subject comedians purportedly delinquent in these respects to disciplinary treatment beyond mere reprimands. And, within my view, General Counsel's representatives, herein, have not—preponderantly—established that Respondent's normal prestrike practice had, rather, reflected stringent punitive or retaliatory reactions.

d. *Conditions under which comedians perform*

Within the Comedy Store's Los Angeles facilities, stages, piano players, lights, and sound systems are provided for Respondent's performers; concededly, Respondent's several arrangements, in this respect, comport with industry practice. Further, Respondent provides a designated master of ceremonies, who delivers "introductions" for the scheduled performers; the master of ceremonies likewise performs a nominal monitor's function (which will be noted, subsequently, within this Decision) with respect to limiting each comedian's performance time to his particular spot's previously scheduled duration.

Comedians are requested to report on time for scheduled performances; Respondent has publicized its preference, however, that Comedy Store performers should report a half-hour early, so that their master of ceremonies, for the night, will be apprised regarding their presence before they are due to perform.

Concurrently with their performances, comedians may give Respondent's piano player particular directions, should they require musical accompaniments during their presentation. Should they so desire, they may direct a modulation, with respect to the volume of Respondent's sound system. Further, they may request the Comedy Store's designated master of ceremonies to provide any special introductory remarks which they desire.

Comedians are directly responsible, generally, for creating, developing, and refining their particular comedy routines. They provide their own costumes, props, and music—whenever such accoutrements or materials may be required. Respondent does not require comedians to store their props within its Los Angeles facilities, and most do not.

Comedy Store performers, further, prepare their particular routines, personally, for presentation. They determine their comedy monologue's content; likewise they determine the sequential order pursuant to which their successive jokes, or humorous sallies, will be proffered. (The record warrants a determination, which I make, that—when comedians have performed their routines for Shore's preliminary consideration—her comments and critical appraisals, both with respect to their comedy monologue's *content* and their *manner of presentation*, may have been requested or voluntarily provided. The circumstances under which such comments and critical evaluations by Respondent's proprietor may have, heretofore, been proffered—together with questions raised, herein, regarding their weight and possibly "controlling" significance—will be considered, subsequently, within this Decision.)

Respondent's comedian performers may, sometimes, find themselves required, however, to modify their presentations. They may find themselves constrained to limit their physical movements within the confines of Respondent's stage; they may be required to vary their routine's content, depending upon their performance's particular location, their particular audience's reaction, their possible harassment by hecklers, and belated discoveries regarding their monologue's possible subject-matter congruence with a preceding performer's discussion topics.

In this connection, Respondent's scheduled performers—themselves—normally make whatever adaptive changes their particular situations may require. The Comedy Store does not directly *require* them, preliminarily, to rehearse their presentations, whether on Respondent's premises, within their homes, or within some other public facility. (Respondent's women performers, regularly scheduled for Sunset Boulevard's Belly Room presentation, were "urged" by Respondent's proprietor to make arrangements for rehearsal time with the Belly Room's regular piano player, since she (Shore) concededly "liked" performances, particularly by women comedians, which utilized music to punctuate sustained stand-up monologues. Some comediennes, so the record shows, complied with this suggestion. They had been told by Respondent's proprietor, so comedienne Susan Sweetzer testified, that she (Shore) had previously asked the Belly Room's piano player to make himself "available" for rehearsal, when requested, and that he had declared his willingness to rehearse with scheduled women performers.)

When regularly scheduled comedians perform, they perform, concededly, without any concurrent directions provided by "house" representatives.

The record, considered in totality, will support a determination—within my view—that Respondent's proprietor considers a scheduled comedian solely responsible, in the first instance, for devising the *manner* in which his comic routines will be presented, so that particular audiences will be entertained. Comedy Store performers may—sometimes—be told to cut down, lengthen, or modify their routines; normally, however, they will not be told precisely *how* such cuts, supplementation, or changes, whether directed or requested, should be made. (From time to time, Respondent's proprietor may, concededly, proffer comments regarding a particular regular comedian's scheduled act; her comments may be directed either to his comic, routine's *content*, or his *manner* of presentation. Further, she may—sometimes—comment, generally or specifically, regarding the comedian's career choices. Her comments, when proffered, have—in most cases—been given serious consideration by the comedian concerned; however, her "advice" may be followed, or may sometimes be slighted. Respondent contends, herein, that Shore's comments represent "career counseling and encouragement" merely; further, Respondent contends that comedians suffer no "reprisals" when her comments

are disregarded. Subsequently, within this Decision, these contentions—which General Counsel's representatives have countered with testimony calculated to suggest that, when Shore's comments have been disregarded, the comedians concerned have suffered career consequences short of *direct* reprisal—will be considered.)

During performances, Respondent's scheduled comedians may—sometimes—continue beyond their allotted time. When this happens, Respondent's schedule for the night may be set awry; sometimes, this may prevent comedians given late night time spots from realizing their scheduled opportunity to perform before the night's audience leaves. Concededly their feelings, consequently, may be hurt. Thus, to signal a performing comedian that his previously set time has expired, and that Respondent's next scheduled comedian is waiting to perform, the night's master of ceremonies will flash a light, wave his hand, or hold up a candle. When shows, on particular nights, are running significantly behind schedule, such "cut off" signals may be given frequently. They are, usually, respected; the signaled performer leaves the stage. Comedians who persistently remain on stage beyond their allotted time may be seriously reprimanded; the present record, however, will not—preponderantly—support a factual determination, within my view, that they are *directly* disciplined for such derelictions.

e. *Group relations*

Commencing in October or November 1978, subsequent to Shore's dedication of Sunset Boulevard's Belly Room to comedy presentations by women performers exclusively, she began scheduling a series of periodic biweekly Wednesday afternoon meetings, held in the room, for Respondent's previously designated regular comediennes. The comediennes were given prior notice, usually by telephone when they called Respondent to report their availability, whenever these meetings were scheduled; comedienne Joanne Astrow testified, credibly, that she believed those notified were "expected" to attend. (While a witness, Astrow conceded that she was never told she would not be "employed" thereafter, should she fail to attend the meetings. She declared, however, that—since she believed a performer's continued connection with Respondent's public presentations "largely" depended upon how well his or her personal relationship with Shore was maintained—she considered it "important" to be there.)

The meetings normally lasted an hour or somewhat longer; during most of them, Shore, so the record shows, discussed numerous topics of presumably "mutual" interest with the comediennes present.

Nothing within the present record would warrant a determination, within my view, that these meetings were particularly called to promote discussion, or to provide specific instruction, with regard to how women comedians might "improve" or "refine" their routines. When queried regarding their general tenor, Astrow characterized them, rather, as "pep rallies" primarily; she testified, credibly, that, so far as Shore was concerned:

> . . . the intention of the meetings had mostly to do with . . . the success of the Belly room as a business entity . . . [She] presented [her belief] that it would be good for women comediennes if the Belly Room became a business success . . . .

Further, comedienne Susan Sweetzer reported, for the record, that Respondent's proprietor frequently discussed general Comedy Store policy:

> . . . how to make the Belly Room function well as a women's room . . . how to promote the room, how to retain the femininity of the room, and the fact that Mitzi really wanted a place where the women could work exclusively . . . where they would not be inhibited by the general hostility of the Original Room . . . in terms of being in competition with men.
>
> * * * * *
>
> She wanted to know what would make us feel comfortable, what kind of image we wanted to have [for] the room—what kind of ambience we wanted created in the room . . . .

Upon occasion, Shore would compliment the comediennes present whom she considered to be following the "right track" with their routines; she declared that she "liked" various things they were doing. *Inter alia*, she did encourage them, as previously noted, to utilize music in connection with their presentations. She commented that she considered the Belly Room successful, since it helped women performers "find" themselves.

Consequent upon complaints and suggestions proffered by various comediennes during these meetings, Respondent's proprietor further took several steps calculated to enhance the Belly Room's presumptive desirability for performance purposes. A drink blender, located behind the room's bar, which could be, and sometimes was, turned on by Respondent's bartender just in time to ruin a comedienne's "punch" line, was removed from the room; the bartender was, likewise, requested to ring up drink tickets, on his cash register, solely during periods of audience laughter, and not while "set up" or "punch" lines were being delivered. Respondent, pursuant to request, provided a colored plastic spotlight attachment which could soften the Belly Room spotlight's white glare. Finally, so the record reveals, Respondent's comediennes requested padding for the Belly Room's door, so that—when it was closed—distracting noise and laughter from Sunset Boulevard's other rooms could no longer disturb their performances. Their requests was complied with.

f. *Further concomitants of the relationship between the comedians and Respondent*

Comedians received no monetary pay from Respondent for Los Angeles performances, prior to their concerted work stoppage previously noted herein. Since shortly before Shore's negotiated concurrence with the May 3, 1979, written "agreement of settlement" which terminated the stoppage, however, Respondent's performers have been financially compensated. And Respondent's sched-

uled regulars are currently paid fixed sums for their complete acts rather than variable compensation for whatever time their performances may require. (The Comedy Store now pays comedians $25 per complete acts, for performances throughout the calendar week—save on Monday nights—in Sunset Boulevard's Original Room; pays $10 per act during the week, and $25 per act on weekend nights, at Westwood; and divides 50 percent of the cover charges collected from patrons, between the comedians scheduled to perform in Sunset Boulevard's Main Room. The record, herein, suggests that Respondent sponsors no comedy presentations—currently—within Sunset Boulevard's Belly Room. Performers selected by Shore for weekly engagements at Respondent's La Jolla location, however, have—throughout the period with which we are concerned—performed there, for compensation, pursuant to written agreements stipulating that they may be considered independent contractors.)

Every "regular" comedian who performs, pursuant to schedule, within a particular location receives the same compensation; the record warrants a determination, which I make, that this "equal pay" concept, currently in force, derives from demands formulated and proffered by Respondent's designated "regulars" during their May 1979 negotiations with Shore which produced the written agreement of settlement previously noted.

Presented as Respondent's witness, comedian Dailey Pike testified, without challenge or contradiction, that, currently, he averages $200–$250 in monthly income, from his Comedy Store performances.

Comedians who performed as scheduled regulars within Respondent's Los Angeles facilities, before the work stoppage previously noted, had not written contracts; since the stoppage's termination, likewise, Respondent negotiates no written "agreements" with comedians, save for those performing within its La Jolla facility.

Before their work stoppage, however, Respondent's scheduled Los Angeles performers did enjoy certain gratuitously provided perquisites—possibly cognizable as fringe benefits or forms of compensation—by virtue of their recognized regular status. They were granted personal admission privileges, without being required to pay a cover charge, with respect to Respondent's Los Angeles facilities; at Sunset Boulevard, they were given car window stickers by virtue of which they were permitted to park, without charge, within a nearby hotel's parking lot. While on Respondent's premises, for performance purposes, they were permitted two "complimentary" drinks. For some time, shortly before their work stoppage herein noted, Respondent had, further, provided regular comedians with a complimentary Saturday night brunch. On occasion, they were given T-shirts; some comedians—their number never specified—received Christmas presents.

Each comedian, within the group with which we are presently concerned, has always been responsible for paying his own Federal and state taxes; Respondent withholds no portion of whatever compensation comedians currently receive, for Federal or state income tax purposes.

Further, Respondent currently provides no workmen's compensation coverage for performers. At one time, pursuant to advice received, Respondent did carry workmen's compensation insurance for comedians, concededly for the purpose of forestalling a possible $10,000 penalty, based upon presumptively relevant State of California Labor Code provisions. This coverage was dropped, however, when Respondent was notified by a Department of Industrial Relations representative that "based upon the facts represented" within a letter submitted by Comedy Store counsel, the department would consider the comedians concerned "independent contractors" for whom worker's compensation insurance coverage would not be sought.

Many comedians within the local comedy community—though recognized as performance regulars for Comedy Store scheduling purposes—routinely seek differentiated, but comparable, work within the public entertainment field. Personally, or through retained agents, they may solicit performance opportunities with motion picture, stage, or television show productions. Further, they may, occasionally, perform as stand-up comedians within clubs other than Respondent's designated Los Angeles facilities. (The record persuasively suggests, however, that some comedy practitioners—particularly those who may not have yet won significant public recognition as comic monologists—may, of necessity, derive their primary livelihood through regular work outside the public entertainment field, while persistently seeking performance opportunities therein.)

When performing elsewhere—whether as stand-up comedians, actors, or in some comparable capacity—such persons may, occasionally, be required to provide services on the very night, or nights, for which their Comedy Store performances, that week, may have been scheduled.

The record, considered in totality, will support a factual determination within my view that Respondent claims no *formal* or *consensually recognized* command "right" whereby comedians may be restrained, or have been restrained, from performing their comedy routines pursuant to arrangements with different public entertainment providers. (However, several witnesses, summoned by General Counsel's representatives, testified—purportedly because of hearsay reports received, plus their subjective "feelings" or "common knowledge" or "general understanding" generated thereby—that comedians who had performed at comparably well-known clubs disfavored by Shore might not be scheduled thereafter for Comedy Store performances. *Inter alia*, these witnesses testified that their fellow comedian, Tim Reid, had reportedly performed for a San Diego club-restaurant, T. D. Hays, subsequent to Shore's termination of Respondent's performance-booking relationship with that enterprise. They declared that Reid was never "seen" performing at Comedy Store facilities thereafter; they "understood" that he was considered *persona non grata*, so far as further Comedy Store performance spots were concerned. Comedienne Dottie Archibald further testified, credibly and without contradiction, that when Reid subsequently *visited* Respondent's Sunset Boulevard fa-

cility, pursuant to a specific invitation from comedian Tom Dreesen, who was being feted during a friendly "roast" sponsored by fellow comedians—he (Reid) publicly referred to his current banishment; Archibald reported that Shore, who was present, did not—so the comedienne noted—find Reid's comment amusing.)

Credible testimony will, nevertheless, support a factual conclusion, within my view, that Respondent's proprietor has, sometimes, suggested that comedians should avoid certain other clubs which might solicit or welcome their services. In this connection, Archibald's testimony, which I credit in this particular, reveals Shore's suggestion, sometime during 1978, that she should eschew further performances at The Improvisation—concededly a competitive Los Angeles comedy club—because its proprietor, Bud Friedman, was "not a nice person" and because it was "not a good place" for her to work. Further, Archibald reported Shore's advice—proffered pursuant to her (Archibald's) solicitation—that she should reject a tentative proposal pursuant to which she was promised a booking to perform at Chicago's Playboy Club, because such a booking "would be bad" for her career. The comedienne never accepted a Playboy Club booking; she did, however, continue her Improvisation performances. Her testimony reflects her professed recollection, however, that, further Improvisation appearances "prevented" her from becoming a favored Comedy Store performer, whom Shore would schedule frequently.

The present record, however, clearly supports a determination that many regular Comedy Store performers seek, and frequently secure, performance time as standup comedians with other comedy clubs or purchasers of comic talent. When performing elsewhere, they may sometimes identify themselves as regular Comedy Store performers; they have not, however, been required to do so. Nor have they been requested or required to report their compensation, derived from performances elsewhere, to Respondent's management representatives. (Occasionally—so record testimony, which I credit, shows—comedians may be *requested*, by Respondent's public relations representative, to make themselves available for local radio shows, or newspaper interviews, during which their Comedy Store connections, and performances, would be discussed. No determination would be warranted, however, that particular comedians have been *told* that Respondent considers their public appearances obligatory, or that they would be disciplined—through some subtle form of reprisal—should they fail to comply with Respondent's designated "publicity" requests. Comedienne Dottie Archibald testified, credibly, that she complied with these requests for public appearances with the "hope" that they would help her get more and better performance time spots.)

Respondent's proprietor, so the record persuasively suggests, considers most regular Comedy Store performers qualified—some to a greater, and some to a lesser, degree—with respect to fulfilling engagements, within the public entertainment field, whether in motion picture, stage, or television productions, nightclubs, or prearranged college campus tours.

Shore may significantly help comedians display their comic skills and qualifications for prospective talent purchasers, such as nightclub proprietors, motion picture and stage producers, television show producers and directors. Respondent's proprietor frequently sets up "showcases" for that purpose. (Showcases are public performances, specially scheduled, which prospective purchasers of comic talent have been invited to attend, and during which they may judge the comic skills of the showcase performer or performers, and determine whether to engage them. Sometimes, comedians have requested Shore to schedule showcase presentations; Respondent's proprietor, however, may refuse. Once—so credible testimony, proffered for the record, shows—she rejected a performer's showcase request because she did not consider the comedienne concerned "ready" with respect to performing effectively. Sometimes, Shore schedules showcases herself, pursuant to prospective "buyer" requests received, or pursuant to some personal decision; particular comedians, whom she presumably considers qualified for such presentation, will then be requested to participate.)

When showcases have been set up pursuant to Respondent's initiative, the comedians requested to participate may presumably decline. Comedienne Joanne Astrow's proffered recollections reveal that she once considered declining a proffered showcase opportunity because she felt her presentation, at Shore's proposed time, would not promote her career. However, she finally chose to participate—so her testimony shows—because she "felt" that her Comedy Store position "might be jeopardized" should she fail to follow Shore's instructions. Considered in totality, the record, within my view, will support a determination that reported declinations by comedians, with respect to proffered showcase spots, have been rare.

Respondent does not, *explicitly*, require comedians to spend their evenings at Respondent's Los Angeles facilities when they have not been scheduled to perform. The record shows, however, that many comedians do "hang out" within Respondent's Sunset Boulevard and Westwood locations, during nightly show periods when they have not been scheduled. (Before nightclub proprietors, within this field, developed weekly or nightly scheduled lineup procedures, the phrase "hanging out" described a practice whereby professed comedians would wait around comedy clubs, in the hope that they might, momentarily, be selected for performances. Summoned as Respondent's witness, Meg Staahl, Shore's executive assistant, testified that—since Respondent currently presents nightly shows pursuant to schedules—comedians have no reason for hanging out within Comedy Store facilities while hoping to be tapped for some show participation; Staahl declared that nonscheduled comedians now visit the Comedy Store primarily for social contacts. While on Respondent's premises, so several of Respondent's witnesses reported, they may discuss their careers, or try out new comic "bits" with fellow comedians. Shore's executive assistant conceded, however, that—should a given night's show suffer a last minute cancellation or failure to report, by some scheduled performer—another comedian who was "hanging out" might be requested to serve as his replacement.)

And comedienne Dottie Archibald testified—basing her testimony upon her personal observations, communication with her fellow comedians, and general "understanding" within the local comedians' professional community, plus various conversations directly with Shore and her secretaries—that "hanging out" was consensually considered "part of the job" so far as regular Comedy Store performers were concerned. The comedienne, so her testimony shows, regularly "watched and saw" that comedians who "hang out all the time" were given more scheduled time spots than those who did not.

According to Archibald, frequent "hanging out" was more important for lower level regular comedians who had not yet won public reputations sufficient to qualify them for desirably prime time spots weekly; they would "hang around [Mitzi Shore] like moths around a flame . . . and make witty little comments" calculated to win her favorable notice. Further, comedienne Susan Sweetzer testified, categorically, that Shore has specifically told her:

> . . . that if [she] expected to get time and better time at the Comedy Store, that [she] was required to hang out . . . .

According to Sweetzer, she started going to Respondent's Sunset Boulevard or Westwood facility "four and five nights" weekly; her testimony shows she began to receive scheduled time spots "two to four" times per week.

Upon the present record, which has been fully considered, but which need not be further recapitulated, determinations would clearly seem to be warranted, within my view, that Shore considers the presence of comedians "hanging out" within Comedy Store facilities desirable, since their presence generates a favorable ambience calculated to stimulate public patronage; that she considers the presence of such a coterie, therefore, good for Respondent's business; that she has—once at least—declared that she considered herself "the mother of all comedians" and that "the more of her children that hung around" the happier she felt; and, consequently that—when Shore considers particular comedians worthy—their specific reward for hanging out when not performing will be more, or more desirable, peformance time allotments. That Respondent's corps of regular comedians, generally, correctly perceives Shore's manifest viewpoint—despite her conceded failure to frame a definitive rule—regarding the desirability of their frequent presence on Comedy Store premises, and their possible future time spot rewards, cannot be doubted.

g. *Professional progression within the Comedy Store system*

When this case was heard, several of General Counsel's witnesses were queried, *inter alia*, regarding their personal, subjective motivation, with respect to their vocation as public entertainers. Since, prior to their concerted work stoppage, previously noted, those comedians who performed at Respondent's Los Angeles locations had not been monetarily compensated, questions were raised with respect to their primary purpose, when soliciting scheduled performance time there; Respondent's counsel sought to elicit concessions, essentially, that their basic purpose, when they sought performance opportunities before live Comedy Store audiences, had been to develop and perfect their comic skills and presentation techniques, rather than to pursue a livelihood bottomed—primarly—upon their immediate relationships with Respondent's enterprise. When queried in this connection, comedienne Ann Kellogg Elder testified, however, that counsel's suggestion did not compass her purpose entirely; she declared, rather, that:

> Part of my purpose is that I had been an entertainer all of my life, and, by continuing what I had been involved in for some twenty-seven-odd years, was a natural state for me. It is most natural for me to be on stage dealing with my personality on a performing level than it is for me to be anywhere else. I have more freedom, more self-confidence, more love of self, more involvement with my own entity, when I am performing. And that is a very strong purpose for me. It is wonderful to have a full audience, but it is not totally the purpose. There is much more. There is a much deeper meaning there than merely being in front of an audience and perfecting your act . . . .

General Counsel's further witnesses may not have been quite so articulate; their testimony, considered in totality, persuasively suggests, however, that Elder's subjectively insightful view, regarding her motivation, reflects a perception widely shared within the comedy community.

In their pursuit of self-expression, and self-fulfillment, comedians, so the record shows, naturally seek more performance opportunities. They prefer—and, wherever possible, solicit—performance time before substantial audiences, from whom they hope to win favorable reactions to their presentation.

Within the Los Angeles area, Respondent's Sunset Boulevard and Westwood facilities have clearly provided—throughout the period with which this case is concerned—more performance opportunities, for comedians desirous of fulfilling their psychic needs and concurrently promoting their careers, than other comedy clubs. (Since its establishment, the Comedy Store has provided continuous shows, presenting stand-up comedians, consistently with a scheme of presentation which had, theretofore, been developed in New York City comedy clubs, but which was relatively new, within the Los Angeles area particularly. Currently, so the record shows, some 10 to 15 clubs, within the greater Los Angeles-San Diego territory, present comedians as featured performers. However, save for The Improvisation, previously noted herein, which likewise presents continuous shows with a group of stand-up comedians performing nightly, these clubs normally present featured performers in structured shows, which provide a necessarily limited number of comedy performance opportunities.)

Several comedian witnesses testified herein that, from their particular points of view, the Comedy Store realistically provided "the only game in town" throughout most of this period, since Respondent's facilities provided

the greater number of performance opportunities, by far, for stand-up comedy monologists.

Further, the record, within my view, will support a determination, which I make, that Respondent's two Los Angeles clubs, because of their public reputation, have provided notably prestigious forums for performers desirous of displaying their comic talents.

Nightly, within Respondent's several public rooms, comedians normally seek prime time performance spots—between 9:30 and 11:30 p.m. approximately—since those scheduled spots ordinarily reach the largest, most receptive audiences, and may reasonably be expected to evoke the biggest responses. Weekend night performance times are coveted for the same reason. (Comedians with more performance experience, and demonstrated professional expertise—whom Ms. Shore considers sufficiently well qualified—usually receive prime time spot assignments.)

The last scheduled spots on each of Respondent's bifurcated weekend shows, however, are normally most desired. They are ordinarily reserved for headliner performers; namely, comedians of proven stature, with public reputations considered most likely to promote Comedy Store patronage.

When comedians have been designated "regular" performers, qualified for scheduled presentation within Respondent's facilities, they may, concededly, win Shore's subsequent designation for progressively more desirable time spots. Thus, starting as Monday night potluck amateurs, they may, initially, be privileged to make themselves available for standby duty, ready to replace previously scheduled performers who might not report for performances. Thereafter, they may be regularly scheduled, to perform first within Sunset Boulevard's Belly Room or Westwood; with their consequent professional growth and development noted, they may subsequently be permitted to perform, and likewise participate in showcase presentations, within Respondent's Original Room particularly. (As previously noted, comedians scheduled for Original Room performances may, initially, be granted spots on less desirable weekday nights, and less desirable times, opening or closing the night's presentations. When they have, however, sufficiently developed their comic skills—within Shore's judgment—they may be granted weekday prime time performance spots, and further weekend schedules.)

Thereafter, they may be selected by Respondent's proprietor for service as some night's master of ceremonies; Shore may refer them to booked college tours; or they may be featured, pursuant to contract, within her La Jolla nightclub facility. Eventually, should Respondent's proprietor consider them worthy, they may currently be granted performance time as recognized headliners during "Best of the Comedy Store" shows within Respondent's Sunset Boulevard Main Room, normally scheduled for weekend nights. Some, conceivably, may refine and polish their comic skills sufficiently to develop notable public reputations; when that happens, they may be considered "guest stars" with recognized public appeal. (Comedienne Joanne Astrow defined such a comedian—Mort Sahl—with the comment that, whenever he performed, he could "put people in the seats" simply because of who he was.)

At that point, concededly, comedians will have progressed, within their chosen field of professional endeavor, sufficiently to transcend their presumptive prior dependence of Comedy Store appearances; their subsequent performances, within Respondent's facilities—which may, of course, be provided with some frequency—will clearly be voluntary.

2. Respondent's performance standards

Considerable testimony herein, proffered by General Counsel's witnesses primarily, deals with Shore's purported comments and suggestions, relative to various comedy routines presented by Respondent's scheduled performers. Those comments, so the record shows, might sometimes reflect concern with the content of some particular comedian's monologue; on other occasions, Shore might vouchsafe suggestions with regard to some comedian's comic style, or his methods of presentation.

Summarized briefly, the record herein will, within my view, support a determination that Shore did not, *routinely*, dictate manners and methods of presentation with respect to Respondent's regularly scheduled comedy performers. However, General Counsel's witnesses have, within my view, provided generally credible, largely uncontradicted, testimony, sufficient to establish:

First: That, following comedienne Joann Astrow's April 1978 and November 1978 auditions, Shore commented that she would prefer to have Astrow "do" different characters, rather than deliver a first-person stand-up monologue reflective of her personality. Astrow's credible testimony warrants a determination that she was "upset" by Shore's volunteered comment; that she considered changing her act; but that she finally decided to make no changes.

Second: That, following a Monday night audition by Improvisational Actor Mark Lonow, Shore told him he was "very good" but that he had not presented "enough jokes" during his comic monologues; she "thought" he should do more "one-line" sallies. Lonow had merely queried Respondent's proprietor, so his testimony shows, with respect to whether she felt he could become a Comedy Store regular; when "taken aback" by her comments, he made no further effort to qualify for Comedy Store consideration.

Third: That Shore once suggested, directly to comedian George Miller, that he should save "new jokes" for weekday performances and deliver "tried and true" material during his weekend comedy routines. Miller conceded that no Comedy Store representative had ever proffered suggestions or comments, directly to him, with regard to how comedians might deal with problems generated by hecklers or drunken club patrons during performances. (*Inter alia*, Miller did declare that "Mitzi never said boo to me about my act really." His comment, in this connection, was volunteered.) He testified, however, that no comedian performing at Respondent's facilities could really say "anything" he wanted, since his comic routines, necessarily, would "have to get" their desired results.

Fourth: That Respondent's proprietor once told comedienne Maureen Murphy to reconstruct her act. Murphy

had, for some time, presented "impressions" while using very elaborate costumes and wigs; she had, however, recast her routine, dropping her use of costumes and props, telling more jokes, and presenting—primarily—straight stand-up comedy material. During a conference in Shore's office, Murphy was told—so comedienne Elder credibly testified—that Shore had preferred the comedienne's previously presented act. Murphy and Shore had discussed what the comedienne could do to "improve" her routine, and thereby qualify for more and better time spots; Shore had suggested that she should take a Comedy Store workshop course, and present "more impressions" during her performances. (Comedienne Archibald recalled a different occasion, presumably well before the June 1979 conference with respect to which Elder testified, when Murphy had personally auditioned her revised "straight monologue" routine for Shore's consideration. Respondent's proprietor had then told Murphy—so Archibald reported—that "if she did not put the impressions back in her act" she would not get Comedy Store performance time.) Murphy had, pursuant to Shore's request, modified her routine; she had supplemented her comedy monologue with "impressions" presented more frequently.

Fifth: That, following a Monday night audition by comedian Jimmy Whig, Shore had told him—while Archibald was present—that he would not be given Comedy Store performance time because she did not like his act's content. (Whig had performed within Respondent's facilities previously. He had, for some reason, received no spot assignments for some time, and had "reauditioned" for Respondent's proprietor.) The comedian, so Archibald recalled, had used some vulgar "four letter words" during his monologue's presentation; Shore had declared, specifically, that she did not like his choice of words. The record, considered in totality, suggests—though it may not prove—that Whig subsequently deleted the language which Shore had found personally offensive.

Sixth: That Respondent's proprietor gave comedienne Elder various suggestions—possibly subject to construction as "instructive criticisms" calculated to help her improve her act—which she followed. (Elder conceded, however, that Shore's advice had not been given in mandatory terms, calculated to make her feel constrained to comply.) Among other suggestions, Respondent's proprietor advised Elder to continue working "physically" during her routine, since she did that well—acting out situations, using props and interacting with those props, moving about the stage, and becoming "physically involved" with her stage's space.

Seventh: That, while comedian Tom Dreesen was never told to modify his act's content, or change it, he *heard* Shore tell other performers how to present their routines. Dreesen declared that, when Shore's suggestions were not followed, there was a "good chance" that those who disregarded them would not perform at the Comedy Store thereafter. The comedian recalled one occasion when Respondent's proprietor refused to give a particular comedian time spots, declaring that he "worked" too much like George Carlin, another well-known performer.

Eighth: That a particular Monday night performer, B. J. Douglas, had been given a good Friday nighttime spot, during which he had not performed well. According to comedian George Miller, he had failed to generate audience laughter; Miller testified that he never saw Douglas in Shore's schedule lineup thereafter.

Ninth: That Respondent's proprietor had advised comedienne Dottie Archibald, under circumstances previously noted herein, not to continue peforming at The Improvisation, and to reject booking proposals which would have provided her with a chance to work Chicago's Playboy Club; although Archibald was never subsequently booked for Playboy Clubs, she did continue her Improvisation performances.

Tenth: That, throughout Archibald's working relationship with the Comedy Store, Shore proffered frequent comments with regard to comedy material which she did not like, requesting the comedienne to delete it, and to refrain from presenting it further. She likewise suggested that Archibald should "punch up" her performances—namely, put in more jokes; the comedienne declared, while a witness, that she felt "intimidated" by Respondent's proprietor.

Eleventh: That, when Shore set up a particular showcase performance schedule, Archibald had not been listed. The comedienne had pulled some strings, whereby her participation in Respondent's projected showcase had—so she was told—been particularly requested by the television show producer for whom it was being arranged. When Respondent's proprietor thereafter notified Archibald that she would be designated a showcase participant, the comedienne was told that Shore was herself making this "opportunity" possible, though Archibald could not yet be considered ready. In substance, Archibald testified, Respondent's proprietor was "letting [her] feel" that she (Shore) controlled the situation, and that the comedienne was being granted a personal favor. On other occasions, so Archibald testified, when she had requested showcase participation, Shore would schedule other "favorite" comediennes both before and subsequent to her prearranged time spot, thereby rendering it more likely that—because of comparisons—she would not win favorable notice from the showcase's professional viewers.

Twelfth: That comedienne Archibald was once told, by Shore directly, that another comedienne, Roberta Kent, had used some comic material, plagiarized both from her routine and from comedienne Elaine Boozler's act, while she (Kent) was doing a television show. Respondent's proprietor further told Archibald, so the latter credibly testified, that she would bar Kent from the Comedy Store, and never grant her performance time thereafter, should Archibald and Boozler declare they wanted such punishment levied. Archibald, however, proffered no such request. According to the comedienne, Kent did not perform at the Comedy Store thereafter; she reported to Archibald, sometime later, that Shore had told her she could not work there because Archibald and Boozler had so requested.

Thirteenth: That, when solicited by Archibald for comments, with respect to whether she should engage a busi-

ness manager, Respondent's proprietor had advised the comedienne that such a decision would be a mistake, since she was not ready. Archibald had nevertheless retained a manager; while a witness, she commented that this decision, within her view, had marked "the beginning of the end" so far as her relationship with Shore was concerned.

Fourteenth: That, during her frequent meetings with Belly Room comediennes, during 1978's latter months and thereafter, Respondent's proprietor had discussed Comedy Store policy, with respect to various ways in which Respondent's Belly Room could be promoted, and made to "function" well, as a place for women performers. Shore had told some of those present they were "on the right track" and that she liked various things they were doing. She had particularly commented favorably regarding the comedy material used by comedienne Sandra Blanchard, then a Belly Room performer.

Fifteenth: That, when solicited for comments regarding a new promotional photograph which comedienne Susan Sweetzer proposed to use, Shore had reacted negatively. While a witness, Sweetzer conceded, however, that she had not procured a substitute photograph, and that her picture, which Respondent's proprietor had disparaged, had subsequently been posted on Respondent's Belly Room wall.

Sixteenth: That Shore, so comedienne Sweetzer testified, liked to "sit in judgment" with respect to whether particular comediennes were, or were not, ready to showcase for specific television shows. Some comediennes would directly solicit her judgment in that connection; others might request showcase performance time, and they would then be given Shore's opinion.

Seventeenth: That Respondent's proprietor had once declared her concern that comedienne Sweetzer, during her monologue, was concentrating on subjects—such as the problems of women in today's society—which audiences were "not ready for" yet, and that Sweetzer's manner of presentation, with respect to such doubtful material, was not the most "refined" which she could have employed. Sweetzer conceded that, before she became a regular, she had solicited Shore's advice; that she had conceded Respondent's proprietor was correct; and that she had subsequently rewritten her act, consistently with Shore's suggestions.

Eighteenth: That comedians have occasionally requested Respondent's proprietor to "critique" their performances. Once, when solicited for judgmental comments by comedian Dailey Pike, Shore had suggested that he "seemed" nervous, that he seemed to have been "trying too hard," and that he should try "slowing down" his presentation.

Further testimonial proffers, demonstrative of Shore's concern with the quality of particular comedy performances at Respondent's Sunset Boulevard and Westwood facilities, might conceivably be discoverable, within the record; for present purposes however, those hereinabove detailed, within my view, provide a sufficiently representative sample.

While a witness, Shore did testify that, in order to maintain recognized regular status within her Comedy Store system, comedians must "grow" and "develop" their comic skills; more particularly, she declared, they must become funnier. Respondent's proprietor conceded that she personally decides whether particular comedians have "grown" and "developed" sufficiently. (When queried with regard to her qualifications for judgmental decisions in this respect, Shore declared merely that she had been married to a comedian for many years, and that she sometimes writes comedy material.) Respondent's proprietor conceded further that she sometimes provides Comedy Store comedians with suggestive comic ideas, or basic "premises" for comic monologue bits; these constitute specific pieces of comedy material, each concerned with a single subject matter. The record, however, warrants a determination, which I make, that Shore has received no compensation from Comedy Store comedians for suggesting such premises, and that recipients have never been specifically directed or required to use them.

3. The comedians' vocation

Considered in totality, the record herein will, within my view, support a determination that the vocation practiced by so-called stand up comedians is generally considered a distinct occupation within the public entertainment field. And many comedians, particularly those who perform more or less regularly within Respondent's facilities, do hold themselves out—within their conceived entertainment community, whether local, regional, or national—as professionals, possessing specialized skills. (Throughout the present record, performers within the comedy entertainment field have been described variously as practitioners with a defined "occupation" or "profession" or "field of work" generally. For present purposes, however, subtle distinctions—which might conceivably be drawn between these several descriptive terms—may, within my view, legitimately be disregarded. See *Nevada Resort Association, et al.*, 250 NLRB 626, 642, fn. 27 (1980), in this connection. They have, therefore, been used interchangeably throughout this Decision.) Concededly, successful performances within the field require considerably more than a modicum of specialized comic skill, which may *sometimes* complement a natural "gift of laughter" previously possessed.

Comic skill, so the record shows, may—occasionally—be developed and refined within "workshops" where successful practitioners may be consulted, and proven techniques practiced. Most frequently, however, requisite skills have been developed, so several witnesses testified, through "trial and error" processes, during relatively lengthy learning or practice periods. Such periods may have compassed performances in semiprofessional talent shows, small, locally patronized, nightclubs, vaudeville shows, or hotel show lounges, sometimes coupled with performances as subordinate "opening" acts, for headliner or guest star performers in more prestigious showrooms. For some comedians, so the record shows, performance time within Respondent's two Los Angeles clubs had heretofore provided, and currently provides, learning or practice opportunities required for their professional growth and development.

Comedians spend considerable time preparing their routines, practicing, and refining their performance techniques. Most of them conceive, write, and personally revise their own comedy material. (Further, some may, concurrently, write comedy material—jokes, one-liners, or partial routines—for sale to fellow comedians.) They may, however, likewise purchase additional jokes, or portions of some comedy routine, crafted by others. Their preparations for performance—writing, revising their monologues, and practicing their delivery—normally take place at home; certainly, they rarely take place within the Comedy Store's physical confines.

Each comedian customarily considers himself the proprietor of his particular comic routine; Respondent, so the record shows, claims no right of ownership with respect thereto. Several comedians, who testified persuasively herein, conceive of themselves as performers with a particular, personal "style" which—since it reflects their personality and determines their manner of performance—sets them apart from other comedians. The comedians themselves, normally without the participation of club proprietors connected with their various places of performance, choose the particular "styles" which they desire to project. (General Counsel's witness, Lonow, conceded that comedians usually prepare stand-up routines and methods of presentation which—within their personal, independent judgment—will best promote their realization of particular career goals.)

Thus, certainly in the first instance, Respondent's management representatives herein would have little "input" with regard to some regular performer's choice of performance style; whether Respondent's proprietor, *subsequently*, might persuasively suggest or compel changes with respect thereto may depend on circumstances, such as those noted previously within this Decision.

A stand-up comedian's recognized occupation—namely, public performances which involve the presentation of comic monologues—may concededly be distinguished readily from Respondent's business; clearly, Shore may, most reasonably, be considered primarily a producer or impresario, perhaps a counselor or preceptress, and certainly a provider of public entertainments, rather than a public comedy performer.

Most comedians recognized as regular Comedy Store, performers—save, perhaps, for some relative newcomers within the comedy field—have, concededly, established reputations as public entertainers apart from their Comedy Store connection. And many of them—so the record herein persuasively suggests—have performed, pursuant to professional contracts, for providers of public entertainment other than Respondent herein. (Various recognized comedians have concededly performed—some as stand-up comics, some as conventional actors filling comedy roles, and some in various other capacities—for motion picture and television producers, for radio show producers and for producers of stage presentations.) In some cases, their performances for such entertainment providers have coincided, or run concurrently, with their recurrent Comedy Store appearances; sometimes, however, their preoccupation with various other professional commitments may have constrained them to forgo "regular" requests for stand-up comedy performance time to Respondent's several Comedy Store stages.

When preparing for careers, and pursuing them within the comedy field, professed comedians normally determine, utilize, and publicize their own stage names. Some may publicize their talents, or report their availability for professional engagements, within trade publications. Further, some—their number never specified for the present record—may retain managers to handle their business affairs, together with talent agents qualified by training, experience, and professional connections to help comedians procure professional engagements. They may—and many presumably do—maintain special business telephone connections, or retain telephone answering services, calculated to facilitate their pursuit of public careers apart from Comedy Store performances.

When preparing their personal or professional Federal and state income tax returns, comedians may—and many presumably do—deduct their yearly expenditures for publicity and various telephone services, together with whatever costs they may have sustained while retaining professional talent agents and managers, considering them as business expenses. In this connection, shortly, their practices comport with bookkeeping and tax computation practices conventionally followed by self-employed businessmen.

B. *Discussion and Conclusions*

1. The legal status of professional comedians

a. *Applicable legal principles*

As previously noted, Section 2(3) of the Act, as amended, provides—in relevant part—that the term "employee" should not be construed to compass persons having "independent contractor" status. Congress did not, specifically, define that status, however, within its legislative enactment. When amending Section 2(3) particularly to exclude independent contractors from statutory coverage, Congress declared its purpose, rather, to overrule the substantive holding in *N.L.R.B.* v. *Hearst Publications, Inc.*, 322 U.S. 111, 124–130 (1944), insofar as that decision derived from a premise that principles of agency were not dispositive in determining whether an individual was an "employee" for purposes of the Act. Congress enacted the change "to make it clear" that the term "employee" was "not meant to embrace persons outside that category under the general principles of the law of agency." 93 Cong. Rec. 6441–42 (1947). (See, further, H. Rep. 245, 80th Cong., 1st sess. 18 (1947), I Leg. Hist. 309 (LMRA), which noted that):

> An "employee" according to all standard dictionaries, according to the law as the courts have stated it . . . means someone who works for another for hire. . . . In the law, there always has been a difference, and a big difference, between "employees" and "independent contractors." "Employees" work for wages or salaries under direct supervision. "Independent contractors" undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and

> depend for their income not upon wages, but upon the difference between what they pay for goods, materials, and labor and what they receive for the end result, that is, upon profits.

Consistently with these congressionally proclaimed views, this Board has—with judicial concurrence—routinely undertaken to apply general agency principles, when distinguishing between employees and independent contractors. *N.L.R.B.* v. *United Insurance Company*, 390 U.S. 254, 256 (1968), and cases therein cited.

In discharging this function, the Board must, necessarily, determine the applicability of concededly "broad statutory language" with respect to various fact patterns. *Bayside Enterprises, Inc.* v. *N.L.R.B.*, 429 U.S. 298, 304 (1977); more particularly, by applying general agency principles, it must "determine in the first instance who is an employee" for statutorily defined purposes. *N.L.R.B.* v. *E. C. Atkins & Company*, 331 U.S. 398, 403 (1947). Whenever the Board has done so, its factual and conclusionary determinations have normally been considered dispositive when found to possess "warrant in the record" plus some reasonable basis in law.

(1) The right of control test

> "No one means all he says, and yet very few say all they mean, for words are slippery and thought is viscous." ["The Education of Henry Adams," Ch. 31.]

Both this Board and the courts have commonly relied upon various criteria set forth within Restatement of Agency 2d, Section 220 (1958), when required to distinguish statutorily protected employees from independent contractors excluded from the Act's coverage. That section's principal text provides the following guides:

> 220. Definition of a Servant
>
> (1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.
>
> (2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:
>
> (a) the extent of control which, by agreement, the master may exercise over the details of the work;
>
> (b) whether or not the one employed is engaged in a distinct occupation or business;
>
> (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
>
> (d) the skill required in the particular occupation;
>
> (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
>
> (f) the length of time for which the person is employed;
>
> (g) the method of payment, whether by the time or by the job;
>
> (h) whether or not the work is a part of the regular business of the employer;
>
> (i) whether or not the parties believe they are creating the relations of master and servant; and
>
> (j) whether the principal is or is not in business.

And, consistently therewith, this Board's inquiries have traditionally focused—in the first instance—upon the nature and extent of whatever control may have been reserved, particularly with respect to details of the work, by the person for whom the work has been, or will be, done. *N.L.R.B.* v. *Warner*, 587 F.2d 896, 899 (8th Cir. 1978); *Seven-Up Bottling Company of Boston, Inc.* v. *N.L.R.B.*, 506 F.2d 596, 598 (1st Cir. 1974); *Joint Council of Teamsters, No. 42 [Associated Independent Owners-Operators]* v. *N.L.R.B.*, 450 F.2d 1322, 1326 (D.C. Cir. 1971); *Associated Independent Owner-Operators, Inc.* v. *N.L.R.B.*, 407 F.2d 1383, 1385 (9th Cir. 1969). Accord: *N.L.R.B.* v. *Phoenix Mutual Life Insurance Co.*, 167 F.2d 983, 986 (7th Cir. 1948). Within the case last cited, the Seventh Circuit Court of Appeals declared that:

> [T]he employer-employee relationship exists when the person for whom the work is done has the right to control and direct the work, not only as to the result accomplished by the work, but also as to the details and means by which that result is accomplished . . . .

Conversely, when the person for whom work has been, or will be, done reserves merely the right to control the result sought to be achieved, other persons retained for its performance will be considered "independent" contractors. Comparable formulations, recapitulating this guiding principle's determinative significance, can be found in numerous Board decisions, some of them concerned, specifically, with performers within the public "entertainment" field. See, e.g., *Puerto Rico Hotel Association, et al.*, 259 NLRB 429 (1981); *Capital Parcel Delivery Company*, 256 NLRB 302, 303, fn. 3 (1981); *Kentucky Prince Coal Corporation*, 253 NLRB 559, 560 (1981); *Nevada Resort Association*, 250 NLRB 626, 642–645 (1980); *City Cab Company of Orlando, Inc.*, 232 NLRB 105, 107, enfd. 628 F.2d 261 (D.C. Cir. 1980); *L. C. Sinor*, 168 NLRB 467, 468 (1967); *National Freight, Inc.*, 146 NLRB 144, 146 (1964), and cases therein cited.

Concededly, however, the common law "right of control" test, noted, cannot be relied upon simplistically or mechanically. This Board has commented, with judicial concurrence, that cases concerned with a given person or group's putative status as statutory "employees" or "indpendent contractors" may frequently turn on fine factual distinctions; thus, determinations with regard thereto will, ordinarily, require careful analysis coupled with balanced assessments, pursuant to which "all of the factors [bearing upon] the relationship" have been considered, and weighed, with no single factor deemed deci-

sive. See *Associated General Contractors of California* v. *N.L.R.B.*, 564 F.2d 271, 279 (9th Cir. 1977); *N.L.R.B.* v. *United Insurance Co., supra* at 258, in this connection.

In short, despite the common law right of control test's purportedly simple formulation, decisions in these "employee" versus "independent contractor" cases will, in most cases, depend upon their peculiar, particular facts. There can be "no shorthand formula or magic phrase" relied upon to resolve questions of independent contractor or statutory employee status. See "Black's Law Dictionary," p. 298; compare *Mid-Continent Petroleum Corp.* v. *Vicars*, 221 Ind. 387, 47 N.E. 2d 972. Each case's "total factual context" must always be considered, with due regard, however, for pertinent common law agency principles.

In this connection, further, persuasively relevant Board and court decisions have both noted that—when factual determinations, within each case, have been made with regard to some claimed right of control's nature and scope—findings with respect to that right of control's *existence*, rather than findings dealing with its specific *exercise* merely, will be considered dispositive. See *N.L.R.B.* v. *Cement Transport, Inc.*, 490 F.2d 1024, 1027 (6th Cir. 1974), and cases therein cited; *N.L.R.B.* v. *Steinberg and Company*, 182 F.2d 850, 857 (5th Cir. 1950). Accord: *N.L.R.B.* v. *Warner, supra*; likewise, *N.L.R.B.* v. *Phoenix Mutual Life Insurance Co., supra*, may be noted in this connection.

(However, determinations with regard to such a right of control's *existence* will—in many cases—necessarily be bottomed upon testimonial or documentary evidence proffered to establish particular "instances" wherein some readily cognizable controls, *clearly derived from a claimed or conceded right*, have actually been enforced, or proclaimed as enforceable, by the person for whom some service has been performed, while such proclaimed controls have been, concurrently, specifically acknowledged, acquiesced in, or complied with, by the person or persons rendering services. See, e.g., *Capital Parcel Delivery Company*, 256 NLRB 302 (1981), and *Kentucky Prince Coal Corporation*, 253 NLRB 559 (1980), in this connection. Absent such proof, whereby some right of control's existence may have been *directly demonstrated*, that right's reality would, presumably, have to be *deduced* reasonably from a congeries of collateral "specific considerations" deemed "significant and sometimes controlling" within the common law's purview, which may persuasively "indicate" the challenged right's presence. See *Standard Oil Company*, 230 NLRB 967, 968 (1977), in this connection.)

In some cases, however, jurisprudentially recognizable *bases* sufficient to warrant determinations regarding the claimed right's *existence* may be difficult to designate precisely. Further, the *degree of control* which could—or should—be considered sufficient to warrant a trier of fact's determination that a cognizable employer-employee relationship exists, may—in some cases—be very attentuated. Thus, the dispositive utility of the common law "right of control" test may, sometimes, be difficult to recognize precisely.

For example: The Restatement's authors, within Section 220, Comment (d) on subsection 1, point out that—in some cases which involve persons *customarily* considered employees—there may be *consensual understandings* that their conceded employer shall not, manifestly, exercise control. (E.g.: Full-time cooks will, normally, be considered servant-employees, though all parties *understand* that their employers will exercise no control, in practice, over their cooking.) Moreover, *particular types* of control, some particular control's *manner* of assertion, and specific *occasions* which may call for such a control's assertion or possible implementation, may vary *between* industries or differentiated fields of work, sometimes *within* a given field of work, and sometimes with reference to *various tasks* with respect to which performance may be required therein. Thus, reasonably justifiable determinations with regard to whether a claimed right to control—sufficiently definable to dispose of questions presented, within a given record, with regard to some particular group's "employee" or "independent contractor" status—really "exists" can be most elusive.

(2) The right of control test further considered

In law, cognizable "rights," such as the right of control with which we are concerned herein, have sometimes been defined as well-founded claims. Alternatively, they have been described, generally, as "powers" to function freely. Yet again, they have been characterized as "powers, privileges, faculties or capacities" considered resident in *one* person, whereby he or she may—with the concurrence and help of the state—control the conduct of *other persons*, or demand their satisfaction of defined obligations. See "Black's Law Dictionary," p. 1189, and "Bouvier's Law Dictionary," pp. 2960–62, for some further discussion.

What renders a particular claim then worthy of being considered well founded? Whence come those recognized powers, privileges, or capacities pursuant to which one person may control some other person's conduct, or generate some significant "impact" bearing upon their capacity to function? Generally speaking, claims of power, privilege, or capacity have been said to derive their basic sanction from the consciousness of the community. A *societal consensus*, in short, renders a claim well founded; thus "rights" may realistically be considered *generally acknowledged* claims. In society, such generally acknowledged claims have, when necessary, been given specific legal recognition or protection. Certain powers, privileges, and preserved immunities have been recognized, defined, and given protection in constitutions, statutes, and decisional principles laid down within the framework of common law; obviously, then, such powers, privileges, capacities, and immunities may thereafter be further created, defined, or limited by *express* contractual arrangements subject to judicial recognition and confirmation.

For present purposes, however, we are—clearly—concerned, rather, with putative "rights" claimed, defined, and presumably recognized, generally, within a given community, consistently with less formal, and therefore less precise, criteria. Since the common law's generally phrased "right of control" test may conceivably be deemed dispositive with regard to particular questions

presented within the present record, we are concerned with claims of right practically manifested, and presumably bottomed, primarily on *custom, usage, purely tacit understandings*, or, conceivably, some consensually recognized social contract. And General Counsel's basic contention herein—that Respondent's proprietor, throughout the period with which this case is concerned, maintained a relationship, with those comedians who performed "regularly" within Comedy Store facilities, bottomed upon certain "rights" which she purportedly *claimed*, by virtue of her presumptively *dominant* position therein, and which Respondent's performers purportedly *acknowleged*, because of their presumptively *dependent* positions—will, therefore, require a review of customary, generally recognized practices and usage, *within Respondent's Los Angeles facilities particularly*, which may arguably suffice to define and characterize the relationship noted.

(3) Considerations of economic reality

In this connection, however, General Counsel suggests, within his brief, that—since Shore allegedly maintained a relationship with Respondent's designated "regular" performers, which, by virtue of Comedy Store custom, practice, and usage, compassed a pervasive system of controls, while it lacked various important attributes generally considered persuasively indicative of conventionally defined independent contractor status—those performers should be, alternatively, considered "employees" statutorily protected, as a matter of economic reality. General Counsel's reference to this particular litmus test—*separately and apart from the right of control test*—for resolving disputed questions relative to claimed "employee" versus "independent contractor" status, reflects his reliance upon the Supreme Court's stated criterion for determining such questions, particularly when they require resolution in connection with Social Security Act litigation. *United States* v. *Silk*, 331 U.S. 704, 712–714 (1947); *Bartels* v. *Birmingham*, 332 U.S. 126, 130–131 (1947). Within its first decision cited, the Court declared that:

> The problem of differentiating between [an] employee and an independent contractor, or between an agent and an independent contractor, has given difficulty through the years before social legislation multiplied its importance. When the matter arose in the administration of the National Labor Relations Act, we pointed out that the legal standards to fix responsiblity for acts of servants, employees or agents had not been reduced to such certainty that it could be said there was "some simple, uniform and easily applicable test." The word "employees," we said, was not there used as a word of art, and its content in its context was a federal problem to be construed "in the light of the mischief to be corrected and the end to be attained." We concluded that, since that end was the elimination of labor disputes and industrial strife, "employees" included workers who were such as a matter of economic reality. The aim of the Act was to remedy the inequality of bargaining power in controversies over wages, hours and working conditions.

The Court's quoted references to its prior decision, dealing with a similar problem under the National Labor Relations Act, derive from *N.L.R.B.* v. *Hearst Publications*, previously herein noted; that prior decision's rule, so the Court stated, should be considered applicable, likewise, when construing social security legislation.

Shortly thereafter, the Court, within a related case—which dealt with social security coverage for bandleaders and band members—referred to, recapitulated, and refined its stated *Silk* principle. *Bartels* v. *Birmingham, supra*, 332 U.S. at 130–131. Therein, the Court declared that:

> [W]e held that the relationship of employer-employee, which determines the liability for employment taxes under the Social Security Act, was not to be determined solely by the idea of control which an alleged employer may or could exercise over the details of the service rendered to his business by the worker or workers . . . . [I]n the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service.

Further, however, the Court commented that—when determinations must be made regarding such dependency—the permanency of the relation, the skills required in connection with particular services rendered, the identity of those persons who invested in facilities required for the work's performances, and the identity of those persons who could enjoy "opportunities for profit or loss" from the services performed, should—together with other factors—be deemed collaterally relevant considerations, which triers of fact must weigh. Cf. *Ringling Bros.-Barnum & Bailey Combined Shows, Inc.* v. *Higgins*, 189 F.2d 865 (2d Cir. 1951), and *Club Hubba Hubba* v. *United States*, 239 F.Supp. 324 (D.C. Haw. 1965), in this connection.

It should be noted, however, that *Silk* was decided *shortly before* the Labor Management Relations Act's final passage, and that the Supreme Court's subsequent *Bartels* decision issued *concurrently* with the statute's enactment. Cognizant of that chronology, this Board declared—sometime later—that, consistently with a declared congressional intent regarding the construction to be given the Act's newly modified Section 2(3) definition, it has routinely followed the usual tests for determining "employee" versus "independent contractor" status laid down in general agency law, and has, therefore, regularly applied the common law right of control test hereinabove noted. *Deaton Truck Lines, Inc.*, 143 NLRB 1372, 1377 (1963). The Board's decision did, nevertheless, report its determination that Deaton exercised a degree of control, over several classes of retained truckdrivers, sufficient to support a finding that they were Deaton's employees "*both in law and as a matter of economic reality*." On petitions to review, denied on other grounds, the Court of Appeals for the Fifth Circuit concurred, 337 F.2d 697, 698–699 (1964). Despite its broadly

phrased conclusionary comment, however, the Board's determination regarding the employee status of Deaton's drivers clearly derived—*primarily*—from specific findings regarding the *degree of control* which that trucking firm then exercised with regard to drivers' services; the Board found the firm's controls concerned, not merely with the business "results" which drivers' services should produce, but likewise with the "means" which they would be required to utilize while providing trucking services. (In this connection, the Board characterized its decision as consistent, not merely with a congressional mandate, but, likewise, with the Supreme Court's *Hearst Publications* dictate that social legislation should be construed "in the light of the mischief to be corrected and the end to be attained." *Deaton's* holding, therefore, could, arguably, be deemed reflective of a determination that the common law right of control test, when relied upon to resolve *doubtful* cases, should be applied with due regard for those "economic and policy considerations" which may, legitimately, serve to infuse Section 2(3)'s simple "employee" definition with meaning. See *Allied Chemical & Alkali Workers of America, Local Union No. 1* v. *Pittsburgh Plate Glass Co., Chemical Division*, 404 U.S. 157, 165–168 (1971). However, the perceived dispositive significance of the right of control test—rather than collateral determinations regarding the concerned drivers' dependency "as a matter of economic reality" merely—would seem to have, basically, dictated the Board's result.)

With matters in this posture, therefore, posited considerations of economic reality alone cannot be herein relied upon, consistently with the statute and relevant decisional principles, to justify claimed "employee" status for Respondent's designated "regular" comedy performers. More particularly, General Counsel's presumptive contention previously noted—that some relevant congeries of factors should be considered sufficient, *standing alone*, to warrant determinations that comedians with recognized "regular" status, within the Comedy Store system, have been and remain somehow "economically dependent" upon Shore's business, and that *therefore*, they should, *without more*, be considered vested with "employee" status for present purposes—cannot be considered well founded. No defined "economic reality" test, *per se*, should be applied, or be deemed dispositive, herein.

b. *Entrepreneurial considerations*

When Section 2(3) of the Wagner Act was amended by the Labor Management Relations Act, 1947, Congress defined the basic legislative distinction between employees and independent contractors with a simple, dichotomous formulation. Employees work for wages or salaries, under direct supervision. Independent contractors, however, maintain their own businesses; while providing "personal" services or workmen hired for the purpose, they handle specific "jobs" for set prices, decide how the work required will be performed, meet their direct costs for goods, materials, and labor, and take on normal business risks while seeking anticipated profits. In other words, they function as *entrepreneurs*, conventionally.

Within the broad spectrum of American business enterprise, however, those relationships which have developed between businessmen, or nominal consumers who desire services performed, and their service providers—whether specifically negotiated, consensually, or bottomed simply upon recognized customs, generally acknowledged business practices, routine usage, or tacitly "understood" reciprocal commitments—have taken many, infinitely varied, forms. Hence, the need for some generally applicable test, formula, or set of criteria—such as the right of control test which has been herein considered—whereby those relationships reasonably deemed worthy of characterization as "employer-employee" relationships may be distinguished from those deemed properly cognizable as "businessmen-independent contractor" relationships.

The common law right of control test, normally, focuses upon relationships formed, maintained, and directly manifested with reference to work performed within a given workplace; that, of course, is where controls—when they are invoked and consensually acknowledged—would normally be exercised.

(Thus, when this Board, backstopped by the courts, discusses powers, privileges, faculties, and capacities which—when exercised by some putative employer—reflect a broadly defined right of control's existence, it notes, *inter alia*, such matters as the manner in which the relationship between the concerned parties was established; the terms of their respective "contractual" commitments, and, particularly, whatever reserved rights the putative employer may legitimately claim to change those contractual arrangements unilaterally; plus the putative employer's claimed and conceded rights to direct the procedures which service providers must follow on the job while rendering service, to require their compliance with dress codes, and to define and regulate their hours of work. Cf. *City Cab Company of Orlando, Inc., supra*. Further it notes record proofs which may reveal, *inter alia*, that a putative employer provides the place wherein particular work or service must be performed, that service providers are compensated for their time, rather than by the job; that their services may have been retained for some indeterminate period, rather than for the time required to complete a given task; that their putative employer supplies the tools, materials, and further "instrumentalities" required for their work's performance; and that their services constitute a clearly "essential" part of their putative employer's regular business operations.)

When the Board—consistently with its mandate to consider the "total factual context" with reference to which some questioned relationship must be categorized—looks to factors presumptively devoid of any *direct* connection with specific work performance, the Agency remarks them and weighs their significance, so the cases show, primarily because such collateral facets of the total situation may, conceivably, provide some bases for *reasonable inferences*, regarding a broadly gauged right of control's nonexistence, or possible presence.

In many cases, however, this Board has, with judicial concurrence, focused—rather—upon various factors characterizing a complex situation presented for consideration which, within its view, have themselves pointed to some questioned group's cognizable "independent contractor" status. These factors have normally compassed discrete facets of the total situation presented—apart from those related directly to work performance—which persuasively suggest *entrepreneurial* characteristics chargeable to particular service providers. See, for example, *Hugh Major, d/b/a Hugh Major Truck Service*, 124 NLRB 1387, 1389 (1959), in this connection. Among the factors noted—within Board decisions dealing with a variety of business and service enterprises—we find: The fact that service providers, whose status must be determined, follow some distinct occupation; the fact that their successful pursuit of that occupation may require particular skills; the fact that such service providers, themselves, normally supply the tools or various "instrumentalities" required for performance; the fact that their services may be retained for limited periods, merely, required for the completion of defined tasks, rather than for periods of indeterminate duration; the fact that they may not be required to accept proffered work, and retain their freedom to render similar services for others; the fact that such service providers may receive specifically negotiated compensation paid "by the job" rather than compensation computed at generally applicable rates, paid for whatever periods of time their performance of work might require; and the fact that they retain freedom to make decisions which may entail risks of loss, or generate opportunities for profit.

When considering cases concerned with performers in the public entertainment field, particularly, this Board has recurrently noted numerous circumstances which, when present, persuasively suggest—within its view—their *enterpreneurial* status, since, presumably, such circumstances may *inferentially* reveal their putative employer's minimal, or nonexistent, right of control over the particular "manner or means" whereby their services are provided. Among these circumstances, Board decisions note: The fact that particular groups of performers may compass numerous persons with substantial experience, gained apart from performances for some single putative employer; the fact that their putative employer may claim no right to proscribe or limit their performance of services for others, and the fact that they may, frequently, provide "freelance" services for other public entertainment producers; the fact that, while making themselves available for "freelance" work, some of them may maintain business telephones, retain answering services, and publicize their talent within local trade publications, presumably to facilitate their procurement of such work; and the fact that, while performing elsewhere, they are not required to—and do not—identify themselves with a putative "regular" employer. See *Century Broadcasting Company, d/b/a WFMF*, 198 NLRB 923, 924 (1972) (radio station announcers). Further, the Board has, in some cases, noted: The fact that performers, themselves, control the "manner and means" of their performance, since—without dictation or direction from their putative employer—they prepare the specific "material" required for that performance's presentation, and may cut down, expand, or modify such material when circumstances require its modification: the fact that performers may, customarily, supply their own costumes, makeup when required, and necessary props; and the fact that—presumably pursuant to consensual understanding and/or tacit acquiescence—the putative employer neither provides payroll deductions for Federal income and social security taxes, nor workmen's compensation insurance coverage for performers. See *Strand Art Theatre, Inc.*, 184 NLRB 667, 668-669 (1970) (theatrical variety artists), and *American Guild of Musical Artists, AFL-CIO (National Symphony Orchestra Association)*, 157 NLRB 735, 736, fn. 1, 740-742 (1966) (ballet dancers), in this connection.

With reference to these cases, the Board has, sometimes, found record evidence which—within its view—fails to establish, *preponderantly*, that some putative employer really "has the right to control the manner and means" whereby particular entertainers provide their services. In other cases, however, Board decisions have reflected determinations, rather, that superficially persuasive testimonial and/or documentary evidence, proffered to demonstrate such a broadly gauged right of control's existence or exercise, should be considerd *overborne* by countervailing proofs which—within the given case's total factual context—persuasively reveal that the performers concerned enjoy a degree of independence in connection with their public presentations, carry defined responsibilities, and assume risks normally associated with *entrepreneurs*, rather than with employees.

With such determinations reached, this Board has—particularly within the cases noted—concluded that members of the performer's group, whose legal status had been subjected to review, should properly be considered "independent contractors" rather than employees statutorily protected.

c. *The relationship between Respondent and regular Comedy Store performers*

With due regard for various considerations hereinabove noted, questions raised within this record, regarding the legal status, for present purposes, enjoyed by comedians considered qualified for regularly scheduled Comedy Store performances, may now be resolved.

(1) Respondent's right of control with regard to their manner and methods of performance

"Whoever can do as he pleases, commands when he entreats." [Pierre Corneille, "Sertorious" Act IV, Scene 2.]

Within their brief, General Counsel's representatives note, cogently, that, following their "audition" performances, Respondent's proprietor, Shore, routinely determined which "Monday night" or "pot luck" comedy performers would be considered qualified for "regular" status, and which qualified "regulars" would, thereafter, be granted performance time on Comedy Store stages. Likewise, she determined precisely where and when their scheduled performances would be given.

Clearly, determinations with respect to whether Respondent's proprietor—when she discharged these particular functions—was, realistically, *hiring* comedians to provide services as employees, or was merely *engaging* some independent contractors who would be provided with recurrent opportunities, thereafter, to practice their distinct occupation within Comedy Store facilities, will depend upon this Board's critical assessments, regarding the general character of the relationship created thereby.

In this connection, some conclusions would seem required, certainly, regarding the character of the relationship generated and maintained, between Shore and Respondent's designated regular performers, *before* the Comedy Store's current pay policy, for them, was initiated. Respondent's customary practice, with respect to managing public entertainment presentations, before that enterprise's regular comedians determined to withhold their services, must therefore be reviewed. (Within their brief, General Counsel's representatives have noted that—subsequent to Respondent's execution of the May 3, 1979, settlement with CFC/AFC previously referred to herein—certain designated regular performers, though not all, were paid predetermined sums for their scheduled performances; that these performers were not, however, free to negotiate, thereafter, regarding such compensation, based on their particular performance's popular success, or their recognized public reputation; that they normally limited to single "set" or "spot" performances during any given evening's Comedy Store program; and that any post-settlement grievances which they chose to press were, consensually, reserved for "handling" through CFC/AFC representation, rather than through direct, personal negotiations with Respondent's proprietor. General Counsel's representatives, however, proffer no contention that these post-settlement developments—themselves—sufficed to transform a previously equivocal relationship into some sort of cognizable "employer-employee" connection. Rather, they contend—merely—that such post-settlement modifications, which significantly strengthened the parties' previously cognizable relationship, should be considered *confirmatory* of that antecedent relationship's statutorily protected character. Thus, the concern professed, within his brief, by Respondent's counsel—that General Counsel might be proffering a legally and logically "impossible" contention, *bottomed upon the purported participation of Respondent's designated regular performers in concerted activity, whereby they sought the right to become employees*—need not be herein considered.)

The fact, however, that Respondent's regular performers, prior to their March-May 1979 work stoppage, received no *monetary* compensation for services rendered—though conceivably suggestive—hardly provides persuasive justification for a determination that no employer-employee relationship had, theretofore, been created. See Restatement of Agency, 2d, Section 220, subsection (2), comment (j); compare Section 225, comment (c). People who provide services voluntarily, without an agreement for, or expectation of, *financial* reward, may still merit characterization as employees, when putative employers, who may have solicited or received benefits from their service, have demonstrably *consented*, or provided some *manifestation of consent*, that their relationship should, realistically, be so construed.

Further, the fact that Respondent's designated regular performers, desirous of Comedy Store work, may have been—personally—required to solicit specific performance time assignments weekly, and provide their scheduled spot services, thereafter, based upon Shore's lineup lists prepared for the current calendar week, merely, will not—alone—warrant a conclusion that they should be considered independent contractors. (See Restatement of Agency, 2d, Sec. 220, subs. (2), comment (j). When short-term services are required—particularly in connection with work which requires some degree of skill—service providers, concededly, may be less apt to consider themselves *subject to control* with respect to work details; such jobs are, conventionally, more likely to be considered *their* jobs, than jobs controlled by the person or persons retaining their services. Workers engaged for sporadic short-term tasks, nevertheless, may still be deemed "employees" within their particular situation's total factual context.)

With due regard for the statute, this Board has long recognized regular part-time service providers, and casual workers with some reasonable expectation of *regular* or *recurrent* work—together with intermittently summoned "on call" service providers—as statutory employees, whenever their *total situation* persuasively suggests a putative employer's broadly gauged right of control regarding the details of their work. Compare *National Opinion Research Center*, 187 NLRB 583, 584–585 (1970); *Tamphon Trading Company, Inc.*, 88 NLRB 597 (1950), citing *B and C Stevedoring Co., Incorporation*, 88 NLRB 321, 322–323 (1950), and *American Fruit and Steamship Company*, 88 NLRB 207, fn. 1 (1950), in this connection. See, likewise, *United Fuel Gas Company*, 50 NLRB 22, 23–24 (1943); *Southern California Gas Company*, 10 NLRB 1123, 1140–41 (1939); *Fedders Manufacturing Company*, 7 NLRB 817, 823–824 (1938). In *Todd Shipyards Corporation*, 5 NLRB 20, 36 (1938), the Board found casual workers who "shaped up" daily when presenting themselves for possible work assignments—with no assurance that they would be selected—nevertheless worthy of classification as statutorily covered workmen. Viewed realistically, Respondent's practice—whereby designated regular comedy performers were considered privileged to telephone Shore's secretary, on Mondays, to report their performance availability, while requesting some scheduled spot placement later within that particular calendar week—likewise clearly constituted, and still constitutes, nothing more than a sophisticated "shape up" system. Pursuant thereto, however, comedians desirous of Comedy Store performance time have merely been required to convey their desires *telephonically*, rather than being required to report and foregather in semicircular groups—like waterfront stevedores—for Shore's personal consideration. Mindful of this Board's several determinations, noted, that providers of regular part-time service, and casual workers whose less-than-regular but recurrent engagements persuasively suggest their *ongoing relationship* with a particular business enterprise, may qualify for statutory protection, we therefore may—tentatively at

least—find Respondent's defined pool of comedy performers, whom Shore concededly considers sufficiently competent for regular schedule placement, likewise qualified for statutory "employee" designation.

As noted, the fact that Comedy Store performers—prior to their concerted withdrawal of services—received no *monetary* compensation for performances, should not, alone, dictate a conclusion herein that they were not "employees" for statutory purposes. Designated regular comedy performers, who were recurrently granted Comedy Store scheduled time spots, were—realistically—compensated, I find, though their cognizable rewards may not have been immediately bankable.

Shore's relationship with Respondent's candidate corps of comedy performers was—so the record clearly shows—highly personal; her dealing with such performers—I find—were bottomed upon, and colored by, personal judgments. Essentially, within her discretion, she *rewarded* them—not by contractually defined compensation payments—but, rather, by subjective judgmental decisions, *calculated to confer status*, which, as the record persuasively shows, they prized.

Initially, Respondent's proprietor—so I find—claimed powers of designation, which she exercised routinely, whereby comedians whom she, herself, considered sufficiently skilled were privileged to solicit "access" with respect to prospective Comedy Store presentations. Thereafter, she determined, within her sole discretion, whether comedian "applicants" would be granted Westwood performance time, or preferred Sunset Boulevard spots; further, she designated the particular Sunset Boulevard room wherein their performances would be scheduled. Shore could, and did, determine whether—within the limits defined by their weekly "availability" declarations—comedians would be granted performance time on well-attended, presumptively desirable, weekday or weekend nights, or normally less desirable, poorly attended nights; and whether they would be scheduled for prime time spots, or some less desirable performance time, within a particular night's program lineup. When selecting performers for prospective showcase presentations, Respondent's proprietor normally designated those comedians whom she, subjectively, considered "ready" for such presentation; further, she determined the scheduled "lineup" sequence pursuant to which their successive showcase performances would be mounted. (The record suggests, in this connection, that Shore's planned showcase schedules—which concededly reflected her personal judgments, with respect to which particular "acts" should precede, or follow, others—could, *potentially at least*, stimulate favorable reactions, from possible talent purchasers, with respect to performances by comedians slotted in comparatively desirable time spots. Conversely, showcase performers, whom Shore might consider less worthy, could conceivably find themselves critically received, presumably because of their particular "lineup" placements, directly preceding or following some favored, highly regarded performer's presentation. Whether Respondent's proprietor deliberately granted showcase performers, whom she considered particularly well qualified, time spots wherein they could "shine" by comparison with their fellow comedians, or, conversely, scheduled less highly regarded performers for time spots wherein their presentations might conceivably be judged harshly, cannot be determined; the record, however, suggests a possibly prevalent belief, within the Los Angeles comedy community, that she *could* do so, and that she may have, sometimes, purposefully followed such a course.)

Shore, through her conceded controls—with reference to determining whether comedians would be granted "regular" status, with reference to whether particular "regulars" would be granted performance time within Comedy Store facilities, with reference to particular locations wherein performances by comedians would be scheduled, and with reference to weekly "lineup" placements—clearly manifested, and gave effect to, her personal, subjective judgment, regarding whatever laughter-provoking potential their performances might reveal.

Respondent's proprietor, likewise, considered herself—so the record clearly shows—vested with the *power* and concomitant *right* to evaluate their personal "growth" and "development" as comic entertainers; to monitor their professional progress, within the so-called Comedy Store system previously noted herein; and to provide them—when she considered them qualified—with progressively prominent, *more favorable*, performance opportunities, whereby their skills as comedy entertainers might be most effectively displayed.

When she did so, Respondent's proprietor—so I find—realistically *rewarded* the Comedy Store's designated regular performers with coin which, though it might not be tangible, they clearly valued. More particularly, she vouchsafed her *personal recognition* with regard to their presumptively growing competence as comic entertainers; concomitantly, she scheduled performance time spots calculated to provide them, consequently, with *progessively greater opportunities* for personal self-expression and self-fulfillment. Likewise, she provided them with *preferred "exposure" placements* whereby they might, conceivably, gain favorable public recognition; and thereby, finally, she facilitated their pursuit of *career goals* as public entertainers, whether within the Comedy Store particularly, through performances of different nightclub proprietors or variety show producers, through appearances in motion pictures, television, and radio productions, or—sometimes—through participation in conventional dramatic presentations.

Through her recognized power to grant, or withhold, such rewards, clearly, Respondent's proprietor could conceivably "control" performances within her Los Angeles facilities. The record, herein, warrants a determination—within my view—that she effectively claimed such a right of control.

Respondent contends that Shore's power to designate comedians qualified for "regular" status, following their successful Monday night auditions, coupled with her conceded power to withhold or withdraw their scheduled Comedy Store performance time spots, should she subsequently come to consider their stage presentations less then satisfactory, reflects her retained right—merely—to form judgments regarding their general qualifications as performers, and their capacity to produce de-

sired *results*, within the Comedy Store's particular field. Cf. *Century Broadcasting Corp.*, 198 NLRB 923, 924. Further, Respondent's counsel suggests, within his brief, that Shore's practices—with respect to weekly performance schedule preparation; her publicized requirements with respect to timely notices of cancellation; her related requirements with respect to timely reporting, nightly, by scheduled comedians; her retained "right of approval" with respect to possibly required substitutions or schedule changes; and her conceded right to dictate the length of scheduled performances and cut them short whenever nightly exigencies might so require—were, likewise, pursued, laid down, or exercised, solely to promote those recreational or diversionary "ends" which Comedy Store performers presumably serve, rather than to force compliance with her views regarding the particular "means" whereby such hopefully sought "ends" might be realized. See *Associated Musicians of Greater Newark (Bow and Arrow Manor, Inc.)*, 206 NLRB 581, 589 (1973), enfd. 512 F.2d 991 (D.C. Cir. 1975); cf. *Strand Art Theatre, Inc.*, 184 NLRB 667, 668 (1970), in this connection. However, Respondent's suggestion—that Shore's customary practices, routine usage, or standard procedures, whereby the Comedy Store's day-by-day operations within the public entertainment field have consistently been maintained, reflect a cognizable "right of control" strictly concerned with the promotion and realization of *desired results*, merely—carries no persuasion.

Previously, within this Decision, references have been made to Shore's sometime manifestations of concern, revealed in diverse ways, regarding the specific "details and means" whereby Respondent's patent *business* objective—the provision of superior quality comedy entertainment for paying patrons—might be most effectively realized. Those manifestations of concern need not be herein recapitulated. They persuasively reflect her claimed "right of control" regarding various *performance details*, whereby the capacity of particular comedy performers—scheduled regularly within Respondent's Los Angeles facilities—to present effective, entertaining, comic monologues might be, within her view, enhanced.

Respondent's counsel contends, with his brief, that whatever seeming "instructions" particular comedians may have received from Shore, regarding their performance's specific content, or style of presentation, should be—for present purposes—deemed "suggestions" merely, which the comedians concerned could freely disregard. The record, within my view, will support a determination, however, that, precisely because she controlled their professional "access" with respect to Respondent's several stages, comedians desirous of Comedy Store performance time spots generally considered Shore's purported suggestions, or critical comments, significant functional *directives* with respect to which compliance would—under most circumstances—be deemed required. In this connection, General Counsel's witness, Mark Lonow, testified that:

> The difference between an order and a suggestion when someone has enormous power over your career is a very very thin line . . . [A] direction and a suggestion from Mitzi Shore is one and the same thing, in my opinion . . . .
>
> When you are beginning a career in which every fiber of your ego, your self esteem, your entire fantasy life of who you are and who you are going to become is involved and there seems to be one path—one way—to make it in your mind, and that is through The Comedy Store, the person who owns The Comedy Store becomes an all-encompassing dictator. Whether in fact that is true or not is almost irrelevant to a person trying to become a regular at The Comedy Store to fulfill their fantasy of being a great star. What Mitzi Shore says is the law. It isn't that she requests or indicates. The mere fact that the thought passes through her mind, in ninety-nine percent of the cases, becomes the law in your life. It is very hard to explain what an entertainer goes through; what an artist whose emotional life is totally involved with the need for success, what goes through their being when someone who they believe controls their destiny says something to them. It is very hard to explain that to someone who perhaps [conceives] of himself as an independent thinker. I am not saying this is right or wrong. I am just saying it is a fact . . . .
>
> Mitzi Shore's Comedy Store is for many . . . for quite a long time it was probably the only game in town . . . . The A.F.C. changed that by allowing their members to perceive that they were not controlled totally by The Comedy Store; that they did have some dignity; that they could request some money . . . . [It] is tradition in the industry—or was tradition until my partner changed that tradition seventeen years ago—to break in new material in little clubs around the country while you got paid for it; while you earned a living at your profession and Bud [Friedman] started not to pay people and that was a new concept. Mitzi turned that hamburger into McDonald's and these people believed that their lives were dependent on a woman—or an institution—that didn't pay them . . . .
>
> The control, whether perceived or not, was in Mitzi Shore's hands. Whether that control was used correctly or whether they perceived it to be used correctly is almost irrelevant. They perceived Mitzi to have the control and she had the ABC contract, which means if you wanted to be seen by ABC or hired by ABC, whether it was true or not, they believed you had to go through the Comedy Store to get hired there. It doesn't matter whether it is true or not. These people believed that to be true and that, in their lives, makes it true. It was the only game in town . . . .

These witness-chair comments, though clearly calculated to suggest their proponent's formulated "opinion" merely, reflect a knowledgeable, articulate, professional observer's viewpoint—one which many stand-up practitioners within the Los Angeles comedy community, *several of them witnesses herein*, patently share. Within my view, likewise, Lonow's proffered assessment, regarding these shared perceptions within Respondent's local corps

of designated regular comedy performers, with respect to Shore's manifest power, may—properly—be deemed persuasively descriptive. Compare *N.L.R.B.* v. *Maine Caterers, Inc.*, 654 F.2d 131, 134 (1st Cir. 1981), particularly the record quotation therein. Suggestions—when proffered within a situational context reasonably calculated to persuade their recipients, subjectively, that failures of compliance would, or could, provoke a confrontation—clearly carry the force of commands.

Respondent's counsel, within his brief, provocatively denigrates General Counsel's purported theory—which he characterizes as novel—that Respondent's proprietor possesses, and frequently exercises "irresistible psychological control, not unlike voodoo" when putatively concerned with the content or presentation of comedy routines, performance records, and further career hopes held by Comedy Store entertainers. Counsel suggests, rather, that some "self-conjured fantasy" presumably shared by such comedians, with respect to what regularly scheduled Comedy Store performances might mean, for their careers, may have generated some "totally subjective illusion" which they purportedly hold, particularly with regard to Shore's proprietary power. Responsibility for that illusion's generation—so Respondent's argument runs—cannot properly be charged to Comedy Store management representatives; counsel suggests that whatever conceptions Respondent's designated regulars may have regarding Shore's putative "whammy" derives, not from statements or conduct clearly chargeable to her, but—rather—from gossip and hearsay, circulated within their comedy community, solely.

Respondent's riposte, however, misconceives the basic thrust of General Counsel's contention. No suggestions have been proffered, for the present record, that Shore currently claims or exercises some broadly gauged right of control—regarding the particular manner in which comedy "acts" scheduled for Respondent's nightly programs have been, or will be, presented—bottomed upon necromancy, derived from putatively supernatural sources, or directly emanating from some purely psychological dominance.

Shore's proprietary or managerial right of control, I find, derives, rather, from readily cognizable, clearly mundane circumstances.

Her Los Angeles club facilities, located in Westwood Village and Hollywood, clearly provide the greatest number of performance "opportunities" within the metropolitan community, for hopeful, aspiring stand-up comedy practitioners. Further, because of their record as facilities wherein a significant number of prominent, publicly recognized headliner and star comedy performers have launched careers, or developed favorable reputations, they provide the most prestigious local stages whereon hopeful, aspiring comedians—conjointly with established practitioners—may present their comic routines, while entertaining presumptively appreciative listeners.

Mindful of Respondent's consequently dominant position, as the best known provider of comedy entertainment within the local "marketplace" for their particular talents, both newcomers and practiced comedians have—quite understandably—consistently sought Shore's personal sanction for Comedy Store appearances. And, since that sanction—when given—has, normally, been bottomed primarily upon Shore's concededly discretionary, subjective judgments with regard to their demonstrable comic skills, comedians desirous of Comedy Store performance time have—so the record shows—normally considered their compliance, with her suggested or proclaimed standards, not merely advisable, but—indeed—realistically required.

In short, whenever Respondent's proprietor has—heretofore—manifested concern regarding the subject matter of some particular comedian's routine, his stand-up monologue's substantive content, his general comic style, or his performance techniques, her critical comments and suggestions have—clearly—been taken seriously by their recipients. And, since she could, conceivably, manipulate or possibly deny scheduled performance spots within her sole discretion, for comedians who might disregard such comments, proffered advice or suggestions, her declared wishes with regard to their "manners and methods" of performance have—so the record shows—normally been considered commands. (Upon this record, certainly, no determination would be warranted that Shore has routinely supervised Comedy Store performers closely, or that she has regularly directed them, regarding the details of their particular monologue's presentation. The fact, however, that Respondent's proprietor may have exercised little control, or less-than-frequent control, over a comedian's presentations, will not foreclose a determination that she possessed the right to do so. It is "the right to control, not control or supervision itself, which is most important." *Grace* v. *Magruder*, 148 F.2d 679, 681 (D.C. Cir. 1945). And, where the nature of a person's work requires little supervision, there is no need for pervasive control. *Mitchell Bros. Truck Lines*, 249 NLRB 476, 481 (1980), quoting *Air Terminal Cab, Inc.* v. *U.S.*, 478 F.2d 575, 580 (8th Cir. 1973). Credible testimony has been proffered, herein, which establishes—preponderantly, within my view—that, whenever Respondent's proprietor, within her discretion, has considered such direction warranted, with respect to matters of detail, she has "exercised" her proprietary or managerial prerogative. And, when she has done so—while coupling her purportedly critical comments or substantive suggestions, sometimes, with a clearly implied hint or specific declaration that failures of compliance might persuade her to circumscribe or withdraw a particular comedian's Comedy Store performance privileges—she has, essentially, been *claiming* a broadly gauged right of control with respect to such detailed matters. Further, when particular comedians—recipients of her comments, advice, or suggestions—have, subsequently, revised their routines or performance techniques, they have *realistically acknowledged*, thereby, her claimed right of control with respect thereto.)

In language consistent with the Restatement of Agency definition, previously noted, the ongoing relationship between Respondent's proprietor and Respondent's recognized regular performers, described and defined within the present record, reflects—so I find—their shared understanding and consequent tacit "agreement"

that Shore, realistically, possesses a right of control which she "may exercise" with regard to "details" which, within her view, have affected, or might affect, their comedy performances.

(2) Comedians as self-employed professionals pursuing a distinct vocation

The conclusion hereinabove noted—that Shore, by virtue of her status as Respondent's proprietor and sole manager, possesses a significant right of control, which she has, upon occasion, heretofore "exercised" with regard to Comedy Store comedians, concerning their manners and methods of performance—cannot, however, be deemed completely dispositive, particularly with due regard for the record herein. Since "all incidents of the [work] relationship" with which we are concerned must be weighed, with "no one factor" found therein considered decisive, some contextual analysis of the actual working relationship revealed must—necessarily—be undertaken. Only such analysis can provide the requisite bases for a determination, with respect to whether Respondent's claimed and consensually acknowledged right of control, *within its particular setting*, has been sufficiently manifested to warrant a finding of statutory "employee" status. In short, the dispositive importance properly attachable to the degree of detailed supervision actually exercised will, largely, be dependent upon the relevant context which other varied concomitants of the questioned relationship may provide. See *N.L.R.B.* v. *United Insurance Company, supra*, 390 U.S. at 259; *N.L.R.B.* v. *Phoenix Mutual Life Insurance Company, supra*, 167 F.2d 983, at 986–987 in this connection.

There can be little doubt, upon this record, that public entertainers who consider themselves stand-up comedians—within the Los Angeles metropolitan area particularly—pursue a distinct vocation, with significant "entrepreneurial" characteristics.

Some have, presumably, gained notable reputations which enable them, consistently, to solicit and procure compensable engagements, within the public entertainment field, confined—exclusively—to recognized "stand-up" comedy performances. Others, particularly those less well known, have found themselves—so the record shows—sometimes constrained to seek varied, but comparable, work within the field, while performing publicly with so-called improvisational groups, or functioning as conventional motion picture, stage, television, or radio actors, cast in scripted dramatic or comedy roles. (Still others—presumably newcomers, desirous of public careers as comedians, whose particular talents may not have been fully developed or generally recognized—have frequently been compelled to derive livelihoods, primarily, from nonrelated work, generally outside the public entertainment field, while consistently seeking greater *opportunities* to practice and perfect their skills as comic performers.)

These members of the so-called comedy community, however, concededly seek long run, or successive short run, "engagements" within their chosen vocational field—calculated, particularly, to display their comic skills—which are normally provided by a diverse group of business enterprises, or through producers, impresarios, and/or managers, concerned with the promotion and presentation of public entertainments. See Restatement of Agency, Section 220, subsection (2)(b), in this connection. When filling such professional engagements, procured within the relevant metropolitan "market" for their public services, comedians may properly be deemed engaged in their "distinct" occupation, previously noted herein.

While their recurrent Sunset Boulevard and Westwood performances, therefore, constituted, and still constitute, a concededly "integral" or "essential" part of Respondent's principal business, Shore's designated regular performers can hardly be considered, themselves, reciprocally dependent, financially or professionally, upon scheduled Comedy Store appearances, solely, while practicing their chosen profession. (Clearly, none of Respondent's putatively regular performers devote "virtually all of their working time" nor even some major portion thereof, on a continuous basis, to Comedy Store performances. Compare *Standard Oil Company*, 230 NLRB 967, 968–969 (1977). As previously noted, comedian Dailey Pike testimonially claims—without challenge or contradiction—that, currently, while providing services subject to Respondent's defined compensation arrangements, he normally derives "income" which approximates merely $250 monthly; such testimony persuasively suggests that his scheduled Comedy Store performance spots may average no more, at the most, than 10 per month. The record, considered in totality, provides no reason for doubt, regarding a determination—which I make—that Pike's reported experience may, legitimately, be deemed typical. Clearly Respondent's putatively regular performers—despite their presumptively recurrent Comedy Store appearances—remain temporarily free to seek comparable engagements, or work in related entertainment field, elsewhere.)

In short, scheduled regular performers—while soliciting performance time and providing services within Shore's so-called Comedy Store system—may constitute a clearly integral part of Respondent's normal business; namely, the presentation of comedy entertainment programs. They may, further, seek, and hope to win, public recognition—motivated by the keenest of desires—particularly through their participation in Comedy Store programs. Clearly, however, their performance opportunities, within Respondent's Los Angeles facilities, have been, and remain, necessarily limited. Before their concerted withdrawal of services—when they performed without *monetary* compensation—these performers may well have considered their limited Comedy Store performance spots constructive stepping stones, calculated to promote their ultimate realization of career goals; they could hardly, however, have considered such performances proximately or directly supportive, with respect to their daily livelihood. And—though comedians, within the Comedy Store system, now receive some compensation—their current situation, with respect to gaining a livelihood from compensable performances within Respondent's facilities, clearly cannot reasonably be considered significantly improved.

The record herein further clearly warrants a determination that stand-up comedians, particularly, normally supply the requisite "instrumentalities" and tools—however intangible those may be—whereby they provide services as comedy performers. See Restatement of Agency, Section 220(2)(e), plus comment (k) thereon, in this connection. More particularly, they personally create, revise, and develop the comic monologues or routines which they present, whereby their comic skills may be displayed; they provide their own costumes and props when required; they practice and perfect their presumptively distinctive performance styles. Within their vocational field, comedians are generally considered vested with "proprietary" interest, so far as their particular acts are concerned. They may present their acts—normally without restriction—both within Respondent's Comedy Store facilities and likewise within facilities maintained by other public entertainment providers. The particular places where they perform and certain incidental facilities may be provided by those engaging their services; e.g., Respondent may provide stages, lights, sound systems, and background music when required, to facilitate their performances. Nevertheless, the fact that comedians, while performing, may utilize such Comedy Store facilities warrants no determination—despite General Counsel's contrary suggestion—that Respondent's management, *thereby*, regulates or controls their presentations; the physical facilities and services noted merely provide certain requisite installations or arrangements calculated to promote effective comedy performances.

With matters in this posture, some determination that stand-up comedians—particularly those considered regular performers within Respondent's so-called Comedy Store system—practice a vocation with substantial entrepreneurial characteristics, can hardly be gainsaid. Many may consider their Comedy Store connection, *per se*, vital. Clearly, however, they value Shore's readiness to grant them "regular" status, primarily, because their recurrent spot performances, within Respondent's Los Angeles facilities, will—so they hope—establish or promote their professional reputations, further their careers, and facilitate their concurrent or subsequent procurement of comparable engagements, elsewhere, whether within the comedy entertainment field, or some related field of endeavor. (As previously noted, most comedians have normally held themselves out, within the public entertainment field, as professionals desirous of short-term or long run engagements with diverse producers or providers. Many have—so the record persuasively shows—fulfilled commitments to perform, pursuant to verbal or written contractual arrangements with producers or providers of public entertainment other than Shore, while concurrently pursuing their weekly solicitations with respect to scheduled Comedy Store performance time. Their particular vocation, thus pursued, may not require commitments, on their part, involving significant capital investments, carrying some consequent risk of financial loss. There can be no doubt, however, that—for many comedians—searches for professional work, *outside the Comedy Store system*, reflect their solicitation of comparable "freelance" engagements calculated to produce a livelihood. To the extent that their searches for such work may, however, require them to incur particular expenses, their procurement of compensable engagements may—arguably—be deemed calculated to produce "profits" beyond their costs.)

In this connection—so the record shows—many comedians choose professional stage names, and publicize their talents in trade publications; some retain business managers and professional agents, to help them handle their business affairs and procure compensable engagements. Concurrently, they may maintain or publicize "business" telephone connections, or subscribe to telephone answering services, calculated to facilitate their receipt of communications related directly to their professional careers. And, when preparing their tax returns, some comedians—so the record shows—do, indeed, treat whatever costs they may have incurred, for the purposes noted, as *business*, rather than as personal, expenses.

Clearly, with respect to these matters, comedians—particularly when concerned with the public pursuit of their proclaimed vocation, apart from their recurrent, part-time, Comedy Store connection—maintain courses of conduct normally considered characteristic of presumptively "independent" business activity, rather than some condition of work-related subjections or dependency, reflective of statutorily defined employee status.

2. Conclusions

> "Look to the essence of a thing, whether it be a point of doctrine, of practice, or of interpretation." [Marcus Aurelius, "Meditations," Chapter VIII, No. 22.]

As previously noted, statutory employer-employee relationships—though necessarily contrasted with the varied business relationships which independent contractors putatively maintain—cannot be readily or precisely defined. Many factors—some of them discussed in detail herein—must be considered, whenever determinations are required with regard to the designated relationship's existence. With this done, triers of fact will, finally, find themselves required to determine—basically—whether or not some collection of presumptively favorable factors has been marshaled, sufficient to sustain a conclusion regarding the questioned relationship's presence.

The record herein, within my view, preponderantly dictates determination that Respondent's concededly fluctuating corps of designated regular performers should be considered independent contractors, rather than statutorily protected employees, for present purposes. On balance, I find, those course of conduct factors—previously noted herein—which persuasively suggest that the comedian's group with which we are concerned should, properly, be characterized as self-employed professionals outweigh those which might, arguably, warrant their designation as persons qualified for National Labor Relations Act protection.

Previously, within this Decision, certain determinations have been made that—when comedians within the Los Angeles metropolitan area particularly, solicit "regular" status within the Comedy Store system and subsequently obtain some scheduled performance "spot" time within Respondent's facilities—they subject themselves,

realistically, to Shore's tacitly, but effectively, claimed right of control, concerning the details of their performance. When considered, however, within its total factual context—including the fact that particular comedians normally provide services, within the Comedy Store system, limited to part-time, though presumptively recurrent, performance spots while concurrently seeking comparable work and practicing their hopefully pursued vocation with other public entertainment providers—the broadly gauged "right of control" which Respondent's proprietor realistically claims, by virtue of various circumstances noted previously herein, and *sometimes* clearly exercises, lacks determinative significance.

Within a recent recommended decision, with respect to which no exceptions have been filed, my colleague, Administrative Law Judge Richard Taplitz, has evaluated the sometimes dispositive, and sometimes nondispositive, significance of the common law "right of control" test in terms which may, reasonably, be considered persuasively relevant herein. *American Federation of Musicians, Local No. 76, AFL-CIO (National Association of Orchestra Leaders)*, Cases 19-CC-1351 and 19-CC-1355, October 30, 1981. Therein, Judge Taplitz noted that:

> In a sense, a [businessman] who calls in an independent contractor to do a particular job has the right to tell the independent contractor in intimate detail how he wants the job to be performed. The independent contractor need not accept the job if he is concerned with having someone watching over his shoulder. If the independent contractor clearly has a business of his own and is only going on a [businessman's] jobsite to perform a particular task, the fact that the independent contractor agrees to do the job exactly as the [businessman] desires both with regard to means and ends does not deprive him of his status as an independent contractor. Taken at a somewhat simplified level, a homeowner who knows a lot about plumbing may call in an independent contractor plumber to fix a leak. The homeowner may tell the plumber that he can have the job only if he uses a certain type of pipe and weld. The homeowner may describe exactly the means by which he wants the job to be done. If the plumber agrees to those terms and performs the work exactly as he is told, he is not necessarily an employee of the homeowner for that hour when he is doing the work. In other words the entrepreneurial aspects of an independent contractor's business can be so clear that the "right to control" test becomes less important.

The relationship generated and maintained between Respondent's proprietor and her designated regular performers—based upon customary Comedy Store practices and Shore's standard procedures—differs, somewhat, from that described in the above commentary. Within the present record, we find a relationship depicted wherein certain vocationally specialized "entertainers" have been granted Comedy Store performance time, *specifically because Respondent's proprietor considers them sufficiently skilled, within their chosen field, to provide satisfactory services which contribute directly to Respondent's regular business.* Analytically, the fact Shore may effectively possess a consensually recognized right to control the manner and means by which performers designated and scheduled by her provided services, directly related to Respondent's principal business, might well provide some support for a determination that such designees should be considered employees. The record, however, reveals further that Respondent's scheduled performers normally provide recurrent part-time or casual, intermittent services, merely, while concurrently pursuing careers—*separately from their Comedy Store connection*—within the public entertainment field generally. Under these circumstances, the fact that Shore may, sometimes, have "intervened to some degree" regarding various details connected with their *Comedy Store* performances, particularly, must be considered, within my view, lacking in significance sufficient to "color the whole relation" with which we are herein concerned. See *Radio City Music Hall Corporation* v. *United States*, 135 F.2d 715, 717-718 (2d Cir. 1943, Learned Hand, C. J.), quoted in *Strand Art Theatre, Inc.*, 184 NLRB 667, 1668-69; compare *American Guild of Musical Artists, AFL-CIO*, 157 NLRB 735, 736, fn. 1, 740-742, in this connection.

In their professional dealings with Respondent's proprietor—before their concerted withdrawal of services, before their self-organization for mutual aid and protection, and before any collectively negotiated "agreement of settlement" calculated to regularize their relationship had been signed—these Los Angeles metropolitan area comedians may, arguably, have been constrained to provide their professional services, without compensation, for Respondent's financial benefit. Upon this record, however, no determination would be warranted, pursuant to the National Labor Relations Act, as amended, that their services were provided as statutorily protected "employees" consciously and deliberately "hired" for the purpose. If, therefore, Respondent's repudiation of their negotiated settlement, coupled with Shore's proclaimed refusal to comply with that settlement's specific terms or to consider consequential grievances bottomed thereon, constitutes a wrong for which some appropriate remedy may be sought—but which this Board, functioning within its proper jurisdictional sphere, cannot provide—that remedy must, obviously, be pursued by some other means, or within some other forum.

Upon the foregoing findings of fact, conclusions of law, and the entire record,[1] and pursuant to Section 10(c) of the Act, as amended, I hereby issue the following recommended:

ORDER[2]

The complaint is dismissed in its entirety.

[1] The record transcript herein reveals a number of transcription errors. No requests for their corrections have, however, been presented. Since most of them may readily be recognized and properly evaluated, within their particular context, no corrections have currently been ordered.

[2] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.